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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 606

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY AND THIRTY-FOUR (34) OTHER RAILWAY COMPANIES AND THE RECEIVERS OF CERTAIN THEREOF

No. 709

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BERWIND-WHITE COAL MINING COMPANY, WESTMORELAND COAL COMPANY, NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY AND PENNSYLVANIA COAL & COKE CORPORATION

No. 710

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BETHLEHEM STEEL COMPANY, BETHLEHEM MINES CORPORATION AND BETHLEHEM STEEL CORPORATION

No. 711

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

RAINEY-WOOD COKE COMPANY, SEABOARD BY-PRODUCT COKE COMPANY, CHICAGO BY-PRODUCT COKE COMPANY AND DONNER-HANNA COKE CORPORATION

No. 712

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS

The opinion of the District Court (Circuit Judge Woolley and District Judges Thompson and Thomson), filed on November 25, 1925, is reported as *Berwind-White Coal Mining Company* v. *United States, and four other cases,* 9 Fed. Rep. (2d) 429 (No. 606, 47–75).

The two reports and orders of the Commission in controversy are published as "*Assigned Cars for Bituminous Coal Mines,*" 80 I. C. C. 520, June 13, 1923 (R. I, 15); 93 I. C. C. 701, December 23, 1924 (R. I, 604).

JURISDICTION

The suits were commenced under Commerce Court Act (c. 309, 36 Stat. 539) and Urgent Deficiencies Act (c. 32, 38 Stat. 219, 220) (R. No. 606, 5; No. 709, 5; No. 710, 155; No. 711, 232; No. 712, 282). They were heard together before the District Court and there was one opinion covering all (No. 606, 47; 9 Fed. Rep. (2d) 429).

On December 15, 1925, the same form of final decree was entered in each case (R. No. 606, 75; No. 709, 142; No. 710, 221; No. 711, 272; No. 712, 311); and on February 6, 1926, the petition for appeal and the assignment of errors were filed in each case (R. No. 606, 76; No. 709, 143; No. 710, 222; No. 711, 272, 273; No. 712, 312). On February 8, 1926 (less than 60 days from the date of the entry of the decree), the appeal was allowed in each case (R. No. 606, 79; No. 709, 146; No. 710, 225; No. 711, 275; No. 712, 315).

THE STATUTE

The sections of the Interstate Commerce Act which control are printed in entirety as Appendix A.

QUESTION

The question is the validity of the order (R. I, 603) which directs that each of the carriers be notified and required to cease and desist * * * and thereafter to abstain, from maintaining and enforcing, in so far as such respondent maintains and enforces, a regulation or practice—

> whereby in the distribution of cars for the transportation of coal among the bituminous-coal mines served by such respondent, whether located upon its line or customarily dependent upon it for car supply, private cars or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal load-

ing currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars;

and—

that each of the respondents which distributes cars to bituminous coal mines located upon its line or customarily dependent upon it for car supply be, and each is hereby, notified and required to establish on or before September 1, 1923, and thereafter to maintain and enforce a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribution of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

STATEMENT

(A) THE EARLIER CASES

History indicates that the assigned-car rule as permitted by the *Hocking Valley* and *Traer cases* has never been permanently accepted; on the contrary that rule, even as modified by the Commission, has been continuously from the beginning until now, the subject of serious and strenuous controversy before Congress, Commission and Courts.

Railroad Commission of Ohio v. *Hocking Valley Railroad,* 12 I. C. C. 398 (1907).

Traer v. *Chicago & Alton Railroad,* 13 I. C. C. 451 (1908).

Royal Coal & Coke Company v. *Southern Railway,* 13 I. C. C. 440 (1908).

Rail & River Coal Co. v. *Baltimore & Ohio,* 14 I. C. C. 86 (1908).

Hillsdale Coal & Coke Co. v. *Pennsylvania Railroad,* 19 I. C. C. 356 (1910), 23 I. C. C. 186 (1912), reparation awarded, *Pennsylvania Railroad* v. *Clark Coal Co.,* 238 U. S. 456 (1915).

Coal and Oil Investigation, 31 I. C. C. 193, 218 (1914).

Assignment of Freight Cars, Senate Resolution, No. 376, 57 I. C. C. 760 (1920).

Report, United States Coal Commission, Part I, pp. 239, 241, 242.

(B) THE ASSIGNED CAR RULE

The Court may look to the history of the times and the environment and such general information and special evidence which was within the knowl-

edge of Congress showing the nature of the evils actual or threatening (*Stafford* v. *Wallace,* 258 U. S. 495, 513).

What is the assigned car rule? Twenty years ago and earlier the carriers delivered to coal mines privately owned or leased cars, foreign railway fuel cars, and cars for the carriers' own fuel loading, according as the cars were consigned or assigned and as the railroad had contracts for the purchase of fuel coal. Such cars were not counted against the distributive share of the mines receiving them which also received in addition their full share of the other cars available for distribution. (80 I. C. C. 525; R. I, 501.) Obviously such mines could ship a greater portion of their daily tonnage output than the other mines. The result was "the whole question of coal-car distribution" was "in a state of flux" and "the distribution of cars to coal mines has been based largely upon interest, prejudice, and pull." (19 I. C. C. 356, 387.)

That practice continued until *Traer* v. *Chicago & Alton,* 13 I. C. C. 451, 453 (1908), when the rules now claimed by the appellees came into being. Private cars, such cars as are assigned to mines for railroad fuel loading as were allowed by the *Hocking Valley* and *Traer Cases,* and cars assigned to mines for loading of other coal upon order of the Commission were designated as "assigned" cars; all others "unassigned" cars (80 I. C. C. 524); if the number of assigned cars placed at a mine during

any period equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars; the assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination; if the number of assigned cars placed at a mine during any period is less than its *pro rata* share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share (80 I. C. C. 524).

Appellees in No. 709 allege that if a mine to which private cars are assigned has a daily rating of 10 cars and the percentage rate of distribution is 70%, or 7 cars, then if the number of private cars assigned to the mine is 7, they would be placed at the mine and the mine would not be entitled to any railroad cars that day; (2) if the number of private cars assigned to the mine exceeds 7, 7 cars and all additional available private cars would be placed at the mine up to its daily rating; (3) if the number of private cars assigned to the mine is less than 7, the mine would be entitled to unassigned railroad cars sufficient in number to make up the total placements that day equal to 7 (R. 606, 44, 45, 46; No. 709, I, 6).

Appellees in No. 710 assume a mine with a capacity of 30 cars per day and a "shortage" of system cars producing a prevailing 50% distribution; if

such a mine relies on system cars it is entitled to but 15 cars; if, however, it has available 30 private cars, it is entitled to them all, but to no system cars in addition; the order would prohibit that mine from using more than 15 cars, whether system, private or both (R. No. 710, 161).

Appellees in No. 711 and 712 assume mine capacity of 30 cars per day; current system car distribution, 50%, so that the mine is entitled to placement of not to exceed 15 system cars; if private cars are assigned to it by their owner, and 30 thereof are available in its locality for placement, it is entitled to have all of them placed, to be loaded and moved out. The order would prohibit the placement of more than 15 of the private cars at the mine and the remainder would remain idle or be treated as system cars (R. No. 711, 242; No. 712, 286).

In *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452, 465, the rule in the *Traer* case was thus stated:

> The order of the commission, as heretofore stated, therefore not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. The general scope of the order was, however, qualified by expressly authorizing a railroad company to deliver to a

> particular mine all the foreign railway fuel cars, the private cars and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the *pro rata* share of the mine the order only permitted the carrier to add a sufficient number of system cars to make up the rightful *pro rata* number.

The foregoing rule as stated by this court in the *Illinois Central case* is the rule which the appellees claim the car service act now allows to them.

The Government maintains that the order merely enforces the statute which by its own terms abolished the assigned-car rule absolutely.

Two similarily situated and competitive mines with substantially the same output are entitled to an equal number of cars for the marketing of their coal. Each is rated on the basis of 150 cars per day. There are available 200 cars—all kinds. Under the statute and the order of the Commission without exception the carrier is required "to count each and every car" both in the rating of the mines and in the car distribution. Accordingly the carrier should distribute the 200 cars equally. If 150 of the 200 should belong to one of the private car owners, the carrier stands ready to distribute the 150 to his mine. Having subtracted the 150 from the 200,

the carrier then stands ready to distribute the remainder to mine of the nonprivate car owner with the ultimate division of the 200 as 150 and 50. The whole case, therefore, is that the statute and the order of the Commission require the carrier "to count each and every car," whereas the carrier and the private car owner place on the statute the broad and liberal construction that the "count" shall mean to count to the mine of the private car owner all of his cars and to count to the mine of the nonprivate car owner the residue. Under their construction, instead of bringing about an equal distribution of cars the statute was passed to perpetuate an unequal, discriminatory and prejudicial distribution. Such a construction is fraught with danger and, if encouraged, might shortly result in large industries absorbing for their own use ownership of practically the whole of the carriers' rolling stock and the carriers would be their mere servants. That is the situation that is before the Court for decision. The private car owner has at all times the alternative of taking his cars off of the line.

(C) THE THREE CLASSES OF CARS

In these several attacks on the order of the Commission three classes of cars are involved (80 I. C. C. 522; 215 U. S. 461).

(1) *System cars*, or cars of railroad ownership, set for loading upon the line of the owning car-

rier or such as may be on its line of railroad and not owned by some specific shippers or restricted as to use.

(2) *Cars for foreign railway fuel,* which are delivered to another carrier consigned to particular mine operators for loading with fuel for the use of the delivering carrier and return to it; and

(3) *Private Cars,* which include cars owned or leased or subject to the exclusive control of particular persons, not carriers by railroad, who deliver them to the railroad for placement at designated mines for loading and subsequent transportation as desired by the private-car owners. The coal to be transported in the private cars may or may not be intended eventually to be used for railroad fuel (80 I. C. C. 522).

The private-car owners are of three classes (93 I. C. C. 750):

(1) Those that own the plants, mines and cars, the latter being used to transport coal from the owned mines to the plants of the owning companies. This class includes the appellees in No. 710, Bethlehem Steel Company, Bethlehem Mines Corporation, Bethlehem Steel Corporation; and the interveners in No. 710, Illinois Steel Company, Carnegie Steel Company, American Steel & Wire Company, National Tube Company, American Sheet & Tin Plate Company, United States Coal & Coke Company, United States Fuel Company, H. C. Frick Coke Company, United States Steel Cor-

poration, Steel Company of Canada, Ltd., Cleveland-Cliffs Iron Company, Perry Iron Company and Youngstown Sheet & Tube Company.

(2) Those that own the cars and plants but not the mines and which have long-term contracts with specified mines for the entire output. This class includes the appellees in No. 711, Rainey-Wood Coke Company, Seaboard By-Product Coke Company, Chicago By-Product Coke Company and Donner-Hanna Coke Corporation; and the appellee in No. 712, Public Service Electric & Gas Company.

(3) Those that own the cars and mines but which are dependent upon outside contracts for the disposition of the coal. This class includes the appellees in No. 709, Berwind-White Coal Mining Company, Westmoreland Coal Company, New River & Pocahontas Consolidated Coal Company and Pennsylvania Coal & Coke Corporation (93 I. C. C. 750).

THE PROCEEDINGS IN THE DISTRICT COURT

(A) NO. 606. RAILROAD FUEL CARS

Thirty-five railway carriers claim about 28% of the total annual production of bituminous coal is required for the operating necessities of the railroads of the United States (R. 6); that there are differences in quality and condition of coals dependent upon mine sources and methods of mining and differences in operating and motive power conditions which call for selection of coals for dependable production of power under the conditions pe-

culiar to each railroad; some operate through coal-producing regions and procure their fuel coal from mines on their own lines (R. 6); others on whose lines no coal is produced get fuel coal from mines on the lines of other railroads; railroads, including appellees, procure their fuel supply from mines (on or off line) owned outright and operated for fuel supply, or from mines (on or off line) controlled by ownership of stock of subsidiary mining corporations, or from mines (on or off line) leased and operated for fuel supply, or from privately owned (on or off line) mines from which the railroad purchases either the entire output or a part of the output. The mine sources are selected with reference to the convenience of location for distribution of coal to the places of use and with reference to dependability of volume and quality of output for the individual requirements of the railroad (R. 7).

They claim that at irregular intervals cars currently available for the movement of coal are insufficient for immediate movement of coal offered for transportation. At such times the appellees have distributed the available cars to all commercial mines (distinguished from total output railroad fuel mines) in proportion to ratings of mine capacity to dig and ship coal; and at such times the necessities for fuel coal of appellees and other railroads frequently exceed the tonnage that could be delivered from the mines from which they draw fuel supply if such mines in making deliveries are

restricted to a pro rata share of available cars; those of appellees who own or control the total output of mines on their own lines have either allotted among commercial mines only the coal cars remaining after a number sufficient to receive indispensable railroad fuel from total output mines have been deducted, or have equipped themselves with coal cars of special design and designation not available for commercial use and placed such cars at such mines in numbers necessary to receive indispensable railroad fuel without affecting distribution of coal cars available for commercial shipments. Such total output mines are not rated for proportionate distribution of cars left available for commercial shipments, and receive no such cars; those of the appellees which procure fuel supply by contracts for part of the output of mines on their own rails place enough railroad cars, in such times, at such mines to take the coal necessary for operation; if such railroad fuel cars equal or exceed on given days such mine's distributive share of cars, no more cars are placed there; otherwise only enough cars to make up (including such fuel cars) the mine's distributive share (R. 7); those of the appellees which have no fuel mines on their own lines have procured or set aside a supply of coal cars especially for fuel; such cars are tendered to the railroads originating coal for placement at the mines from which the railroad owning the cars has made arrangements for total output or partial out-

put. Many of the appellees originating coal for foreign-line fuel consumption place such cars for their owners at the mines from which their owners have arranged for fuel coal; where the arrangement of the foreign line is for total output, the foreign-line fuel cars are placed at the designated mine without regard to distributive share, and where the arrangement of the foreign line is for partial output such mines are not given more than enough other unassigned cars to make up their distributive share (R. 8); that the Commission finds that such use of cars becomes unlawful if thereby the mines furnishing such coal obtain cars for loading of appellees' fuel coal which they would not have been entitled to receive for commercial shipments, and by the Commission's orders appellees have been enjoined from delivering cars at mines for the receipt of fuel coal for which they have contracted unless such cars could have been lawfully placed at the mines for commercial shipments (R. 8).

The carriers further charge that any act done by them necessary to enable them to furnish transportation can not lawfully be regarded and treated as one resulting in undue preference or undue discrimination under Section 3 (R. 9), and the effect of the orders is to deprive the appellees of a lawful and effective means of procuring at all times suitable coal for the operation of their railroads in dependable volume (R. 11).

It is claimed that the restrictions imposed upon the use of private cars by the orders operate to reduce the number of coal cars available for transportation and to deprive appellees of the freight revenue therefrom to the extent that such cars may not be placed at mines designated by their owners in excess of a prevailing pro rata allotment of system cars (R. 12).

Answers were filed (R. 14, 16), and on May 25, 1925, the hearing commenced before the specially-constituted District Court (R. 20). Counsel for the carriers did not introduce a certified copy of the evidence before the Commission. Over the objection of counsel for the Government (R. 20), counsel for the carriers offered evidence *de novo* before the District Court with the following statement (R. 21):

> We are not seeking in any way to bring before this Court any considerations to show the wisdom or the unwisdom of the order of the Commission. We expect to stand squarely on the opinions and reports of the Commission as to what we believe to be the basis for our contention that it passes beyond the Commission's powers. The sole and exclusive purpose of this testimony is to show this particular railroad is affected in a definite way by the order.

Counsel for the carriers called 24 witnesses. Each represented a particular line. Each undertook to state the situation with respect to his line.

This testimony indicated that several already had changed their practices.

JOHN W. NEESNER, General Supervisor of Mine Ratings for the Baltimore & Ohio, which annually consumes 6,500,000 tons, testified (R. 24):

> The effect of the order on our former practice would just simply mean this, that we would have to scatter our fuel orders among a larger number of mines (R. 25).

R. R. HARRIS, Superintendent of freight transportation of the C. C. C. & St. L., which annually consumes 2,400,000 tons, testified (R. 26):

> The contracts are made by our purchasing department of the coal department and in the past, in times of car shortage, they would contract for periods taking the entire output of certain mines, and ordinarily they would try to spread their orders as much as possible to all commercial mines that get out the class of coal suitable for their locomotives.

J. J. MOYNIHAN, Superintendent of Transportation of the Erie Railroad, which annually consumes 3,500,000 tons, testified (R. 27, 28):

> No private coal cars are loaded on the line of the Erie. Prior to the effective date of this order, our practice in regard to the receipt of Erie fuel when from mines on the line of the Erie was that the Erie cars were placed at mines producing Erie Fuel during times of car shortage in preference to

> commercial requirements, but, as I have stated before, the commercial requirements of mines on the Erie are very small proportionately. * * * As to whether there is anything in this commission's present order which would prevent us from doing what I said we did before the order came out, the Commission's order would not affect us materially on our own railroad.

J. T. FITZGERALD, Superintendent of Transportation of the Hocking Valley Railroad, testified (R. 28):

> Prior to the time of this order our method of distributing cars on the Hocking Valley in times of shortage was generally the same as the Chesapeake & Ohio and Pennsylvania Railroad (R. 29).

W. A. COLLIA, Superintendent of Transportation of the New York, Chicago & St. Louis Railroad, which annually consumes 1,500,000 tons, testified (R. 30, 31):

> Before the effective date of this order we had to consign our cars direct to these mines and what I have been describing as our present practice is the result of the order. The order had some effect in the making of our contracts which were made in contemplation of this order. I can not say that the distributing of our contracts for coal supply more widely is the result of the order, but since the order that is true. I can not say offhand among how many we are distributing them. There is no car shortage now to

my knowledge. There is none on our railroad. As I understand it, this order of the Commission brings about a change only in the event of a car shortage. We must take car shortage into consideration in making a contract, that there may be a car shortage at some future time. That is all for the future. We have to be all prepared. This widespread distribution of fuel orders is in anticipation of a possible car shortage.

O. W. CAMPBELL, Superintendent of Car Service of the Missouri, Kansas & Texas, testified (R. 36, 37):

As to fuel coal for our home line and foreign line railroads, our practice has been, prior to the effective date of this order, in times of car shortage, to supply these mines with which we had contracts with the full quota of cars for filling those contracts. That was without regard to the prevailing percentage of distribution. We treated the shortline railroads who do not furnish cars as commercial shippers. If enforced, the effect of the order of the M., K. & T. will mean that instead of our furnishing a full supply to mines with which we have contracts, they will necessarily have to take their distributive share of all cars that are available, regardless of whether for fuel purposes or commercial. Any cars over and above the prevailing percentage which we would apply formerly for fuel receipts will be cut off, and those must be distributed generally. We have not made the change

> already, but there has been an understanding in case of car shortage that the change would be made. There is no car shortage now.

(B) NO. 709. COAL MERCHANTS WHO OWN MINES AND CARS

Berwind-White Coal Mining Company owns and operates mines located on the Pennsylvania Railroad (R. 1, 3) in Pennsylvania and claims to own 3,036 open-top coal cars worth $6,000,000. Their main operations consist of supplying coal to outgoing steamships in New York Harbor and public utilities in New York City (R. 2, 1278, 1279, 1280, *et seq*).

Westmoreland Coal Company owns and operates mines on the Pennsylvania Railroad (R. 1, 4) in Pennsylvania and claims to own 2,012 open-top cars worth $4,000,000.

New River & Pocahontas Consolidated Coal Company owns and operates mines on the Chesapeake & Ohio (R. 1, 4) in the New River and Pocahontas districts of West Virginia and claims to own 1,000 open-top coal cars worth $2,000,000.

Pennsylvania Coal & Coke Corporation owns and operates mines on the Pennsylvania Railroad in Pennsylvania and claims to own 1,000 open-top coal cars worth $2,000,000.

The *gravamen* of the bill of complaint is (R. 1, 12) that the appellees are organized as to capital investment, mine development, supplies, and equipment, working capital, administrative organiza-

tion, labor force, housing facilities, and selling organization to mine, handle, transport, and market the full amount of coal which, with the full service of their privately owned coal cars, and without discrimination, their mines can produce and that such privately owned coal cars would enable them to handle; that if the orders become effective they "will suffer great and irreparable damage in the loss of returns on their investment; in wastage and disuse of their equipment; in wastage and lack of use for their plant and supplies; in the laying off, demoralizing, and loss of their labor force; in the lack of employment and demoralization of their selling organizations; in the loss of the profits under existing contracts by reason of their inability to deliver the coal contracted to be delivered thereunder; in damage claims for nondelivery; and in loss on prospective sales of coal, and prospective contracts of sale, which, but for the denial and refusal of the use of their own transportation facilities to which they are entitled, your complainants are in position to make" (R. 1, 13).

(C) NO. 710. STEEL MANUFACTURERS WHO OWN MINES, CARS AND PLANTS

Bethlehem Steel Company manufactures, sells and ships iron and steel products at plants operated by it in Pennsylvania, New York and Maryland. Bethlehem Mines Corporation produces coal at points in Pennsylvania and West Virginia for consumption by Bethlehem Steel Company (R. 1, 154). Bethlehem Steel Corporation owns the capi-

tal stock of the other two. The three "form essential parts of a unified and integrated business for the production from raw materials of iron and steel products" (R. 1, 155). They claim to own, maintain, and furnish 3,975 open-top cars, which are used in the transportation of coal from the mines to the plants (R. 1, 155) and represent an investment of $8,000,000 (R. 1, 156); that the steel plants represent an investment of more than $408,000,000 and employ 45,000 men; and the mines represent an investment of $68,000,000 and employ 7,800 men—a total investment of over $484,000,000 and employment of more than 52,000 men. The mines are served by the Pennsylvania Railroad, Baltimore & Ohio, Buffalo, Rochester & Pittsburgh, and Cambria & Indiana Railroad, which either directly or through connections also reach and serve the steel plants.

The petition sets forth with meticulous detail the processes for the manufacture of steel, beginning with the acquisition and operation of the mines which produce coal of specific and unvarying metallurgical quality in constant and adequate quantities necessary for production of modern grades of steel; and continuing with the process of continuing refinement which the science of steel making has undergone in the last twenty years; the demands of modern industry call for ever-increasing fineness and ever nicer distinctions in the chemical and physical properties of special grades of steel (R. 1, 156); and that this is particularly true of such prod-

ucts as steel rails, bridge steel, car wheels and axles, automobile steel and ordnance steel (R. 157). It is claimed the orders of the Commission will deprive appellees of the use of the privately owned coal cars during periods of car shortages and thus "to interfere unduly and unlawfully with petitioners in the lawful and profitable prosecution of their business, and to deprive them of the lawful and profitable use of their privately owned coal cars, mines, and steel plants" (R. 1, 167).

Intervening came, *first*, (R. 1, 172) Illinois Steel Company, Carnegie Steel Company, American Steel & Wire Company, National Tube Company, American Sheet & Tin Plate Company, United States Coal & Coke Company, United States Fuel Company, H. C. Frick Coke Company, and the United States Steel Corporation; *second*, (R. 1, 180) Steel Company of Canada, Ltd., Cleveland-Cliffs Iron Company and Perry Iron Company; *third*, (R. 1, 186) Youngstown Sheet & Tube Company. The first group of these intervenors claim to "have invested over $16,000,000 in privately owned coal cars" (R. 1, 176), and all reiterated and adopted "all the allegations contained in the petition" of the Bethlehem Companies "in so far as applicable" to them and to each of them (R. 1, 179, 183, 188); and "Unless such cars are available for the transportation of your petitioners' coal as and when required it will become necessary in times of car shortages, to curtail the manufacture of

coke and to close down part of the mills, resulting in irreparable damage and injury and the throwing out of employment of many thousands of men" (R. 1, 176).

(D) NO. 711. COKE AND GAS MANUFACTURERS WHO OWN CARS AND PLANTS

Rainey-Wood Coke Company owns and operates 110 by-product coke ovens in Pennsylvania (R. 1, 232). Seaboard By-Product Coke Company owns and operates 165 by-product coke ovens in New Jersey (R. 1, 232). Chicago By-Product Coke Company owns and operates 105 by-product coke ovens at Chicago (R. 1, 232). Donner-Hanna Coke Corporation owns and operates 150 by-product coke ovens at Buffalo (R. 1, 232). Each also owns and operates by-product recovery apparatus in connection with the ovens.

The four claim to own 1,900 standard hopper-bottomed steel coal cars worth $6,300,000 (R. 1, 233). Their plants are said to be similar in character and their business and operations substantially the same (R. 1, 233). Each carbonizes bituminous coal, producing therefrom coke, gas, tar and sulphate of ammonia (R. 1, 233). Rainey-Wood Coke Company refines, from the light oils produced, approximately 2,000,000 gallons of benzol annually, used for motor fuel. The purposes for which the coke is sold are set forth in detail (R. 1, 234). The list of customers who consume the gas produced under contracts with the territory served is also set forth (R. 1, 235). The many

purposes for which the tar and sulphate of ammonia produced are sold or used are also set out (R. 1, 235, 236).

The coal cars were acquired in 1920 and are used to carry specially selected bituminous coking coal from the particularly selected mines to the plants (R. 1, 236, 237). The reasons for a continuous supply of uniform grades of freshly mined coals from particular selected mines in order that the by-product coke plants may successfully operate continuously are set forth in detail (R. 1, 237).

The effect of a cessation or lack of uniformity in such operations as well as the causes which bring about coal-car shortages are also set forth (R. 1, 240).

As in the other cases it is claimed the effect of the order of the Commission is to interfere with and disturb the operations of the plants and to hinder the business.

(E) NO. 712. PUBLIC UTILITY THAT OWNS CARS AND PLANTS

Public Service Electric & Gas Company (R. 1, 282) generates, manufactures, and distributes gas and electricity for light, heat, and power for public and domestic use. It claims that its distributing systems are located in 231 municipalities with a population in 1920 of over 2,500,000. The electricity produced is used for public and private purposes; that is, for lighting dwellings and other buildings and public highways and generating heat and power and for manufacturing purposes. The

number of customers using electricity is claimed to be over 525,000. Appellee also claims to manufacture and distribute nearly 36,000,000 cubic feet of gas per day, on the average, for light, heat, and power, much of it being used in ranges for cooking. The number of customers using gas for such purposes is claimed to be over 643,000, and the business, both gas and electric, is rapidly increasing in volume (R. 1, 283).

In September, 1920, appellee purchased 600 coal cars, at a cost of over $1,750,000, to carry coal from Pennsylvania over the lines of the Pennsylvania Railroad.

Prior to the purchase of the cars appellee contracted for the entire output of certain coal mines (R. 1, 284). Appellee was obliged to purchase coal in the market at excessive prices in order to avoid interruption to its business; if not permitted to use its cars it will be impossible at times to operate its properties and to render to its customers the service which their necessities require (R. 1, 284). The effect will be "to prevent the lighting of nearly all of the principal highways in the State of New Jersey, to interrupt the operation of many manufacturing establishments, and make it impossible to use at least 100,000 ranges of cooking by families that are supplied with gas for that purpose by plaintiff and have no other means of cooking food" (R. 1, 284, 285).

We are almost led to believe that without the exclusive use of these 600 cars to this appellee, in

the event of a car shortage the entire population of New Jersey may be caught without food, heat, or light in the face of the winter. Appellee also claims the exclusive right to the use of these cars and that its operations will be seriously disturbed and interfered with if the orders become effective.

It is claimed that before purchasing the 600 coal cars appellee conferred with the Interstate Commerce Commission "to ascertain whether the said coal cars could be used in its business in the manner aforesaid if they should be purchased and was assured that it could be done without interference by the Interstate Commerce Commission. And it was with faith in and solely in reliance upon that assurance that the cars were purchased" (R. 1, 285).

On the hearing before the District Court, appellee produced a witness (R. 1, 307) who undertook to testify concerning conferences with respect to shortage of fuel and stated, "We took it up with all departments at Washington with which we could get a hearing. I ran the whole gamut of the Interstate Commerce Commission office, and finally took it up with the commissioner in charge of car service, known as division No. 5 of the Interstate Commerce Commission" (R. 1, 309). On objection further efforts to prove conversations in Washington were discontinued.

Answers were filed (No. 709, R. 1, 134, 137, 141; No. 710, R. 1, 191, 194, 199, 219, 220; No. 711, R. 1, 254, 256, 271; No. 712, R. 1, 291, 293, 306).

A certified full copy of the evidence before the Commission was offered before the District Court on behalf of the appellees in all of the cases except the *Railroads Case,* No. 606 (R. 1, 656). The testimony and exhibits were reduced to narrative statement and the latter was certified and transmitted to this Court in lieu of the original certified copy (R. 1, 656). The printed narrative statement extends from page 657 to page 1626, inclusive, or a total of 969 pages.

In No. 712, counsel for Public Service Electric & Gas Company offered, over the objection of Government counsel, evidence *de novo* before the District Court (R. 1, 307). On request of counsel in No. 711, and subject to the objections lodged thereagainst, the testimony taken *de novo* in No. 712 was stipulated across into the record in No. 711 (R. 1, 310). The District Court ruled (R. 1, 307) that the objection made to the oral testimony taken before the District Court in the *Railroad Case,* No. 606 (R. 20, 21) should apply without repetition to the testimony thus offered in No. 711 and No. 712, and the objection would be overruled and an exception allowed (R. 1, 307–310).

On May 29, 1925, the hearings were concluded (No. 606, R. 1). On November 25, 1925, the District Court filed its opinion covering all cases (No. 606, R. 47; 9 Fed. Rep. (2d) 429). After a brief reference to the assigned car rule and the history thereof (No. 606, R. 47, 48, 49), the District Court appears to have accepted, as a basis for its opinion,

the facts as alleged in the several petitions and intervening petitions for injunction and not as they appeared in the reports of the Commission (No. 606, R. 50–55).

The opinion of the District Court recognizes that the hearing before the Commission was along broad lines (No. 606, R. 56). The claim that a full hearing was not accorded is not raised by a single appellee.

(F) OPINION OF THE DISTRICT COURT

The learned District Court (No. 606, R. 57), after observing that "the court confines itself to the ultimate question as to whether the Commission acted within its power" and "will not consider the expediency or wisdom of the order or whether, on like testimony, it would have made a similar ruling," forthwith proceeded to emphasize and consider that "sums of money amounting to millions of dollars have been invested" (No. 606, R. 60) which " furnishes *the only means* by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage"; that "the Commission, having no power delegated by Congress over the private-car owner, has, by its order, through its power over the carriers, abolished the use of private coal cars, except subject to the pro rata distribution prescribed, for the only practical purpose to which they may be put, and has thereby deprived the private-car owners of the full use and enjoyment of their rights to operate their mines

and of their full rights under their contracts to supply themselves with coal from other mines"; that "it is apparent either by its order, through indirection, the Commission is assuming to deprive the owners of the use of their private cars and to *regulate the railroads in matters over which it has no control,* or that, if the order made is lawful and within the powers of the Commission, those results are necessary incidents, disadvantageous though their effect upon the plaintiffs may be, to a lawful exercise of the Commission's power" (No. 606, R. 63).

Substituting its findings and conclusions in the place and stead of those of the Commission, the learned District Court further observed (italics ours) that "under the Assigned Car Rule *the mines not receiving assigned cars are not deprived of any advantage pertaining to commerce enjoyed by the railroads or the private-car owners which the commercial mines are not free also to have and enjoy.* True, *they may not have the financial resources to provide themselves with private cars, and they may not have the benefit of sales of railway fuel, but that is one of the conditions the Act does not attempt to equalize. They are not through the hauling of assigned cars deprived of the use of any of the railroad facilities, unless there is during car shortage a shortage of other facilities.* But the order is not conditioned upon such circumstance. It is to be universally applied under all circumstances"; that

"if the supply of fuel coal stops, the transportation over the railways must stop and the public generally deprived of its necessities" (No. 606, R. 70); that *"by order of the Commission, however, they are prohibited from using for their fuel necessities more cars during shortage periods than their distributive pro rata share with commercial mines";* that "it is the apparent intention of the Commission to decide in advance that it will, under its emergency power, substitute for what it now finds to be a just and reasonable order emergency orders putting into effect in whole or part the rule which it is now condemning as unjust, unreasonable, and discriminatory"; that "while the Commission has power in case of necessity to establish priority orders for the delivery of railroad fuel, it has not had conferred upon it the power to determine for the railroads the business methods and practices by which they may in the ordinary conduct of their business provide themselves with fuel. The mining of coal is not commerce" (No. 606, R. 71, 72); that "private cars are in use generally upon the railroads for transporting not only coal, but oil, grain, flour, meat, fruits, vegetables, and numerous other commodities. While the Commission has power to regulate their use for their owner's purposes by a lawful order, their distribution to other shippers in order to bring about a greater pro rata allotment would be confiscatory and beyond the power conferred by

Congress, and the theory of an increase pro rata allotment is, therefore, untenable (No. 606, R. 72); that "*the universality of the order is such that it entirely ignores all conditions except by comparison of mines served with private cars with commercial mines, showing inequalities in time of coal-car shortage in costs of operation, and, through intermittent operation, in difficulties in affording constant employment to mine workers, thereby causing unequal conditions in mine labor*, so that, even though the railways are abundantly able through sufficient motive power, track and terminal facilities, and employees to handle all the coal to be carried for fuel or upon private cars, they are forbidden to do so and the cars must remain idle. *It appears only necessary to state this result to demonstrate its unreasonableness. For the order and the report of the Commission entirely leave out of consideration, in applying what is intended as a just and reasonable rule, the existence of widely varying conditions, viewing them as if constant and uniform.* The order applies to all the railroads of the country extending over a wide expanse of territory and embracing an infinite variety of conditions. It applies to all divisions of all rail carriers in the United States, and at all times when need for allotment arises, to every case, wholly regardless of differentiating conditions" (No. 606, R. 72, 73); that "if the discrimination found by the Commission is based upon the disadvantages to the commercial

mines through the use and enjoyment by the railroads and private car owners of assigned cars in excess of the general distributive shares of their mines, the Commission has plainly exceeded its power in an attempt to regulate the bituminous coal mining industry"; that "*whether the conditions of disadvantage are the result of the railroads continuing during car shortage to obtain their normal supply of fuel, and the private car owners to have their cars placed in normal numbers for the purpose for which they were acquired, or whether they are caused by the overdevelopment of the industry, such conditions, while a matter of public interest and of concern to the Interstate Commerce Commission, are not within the power of the Commission to control except as incidental to the exercise of power in correcting discriminatory and preferential practices by the railroads*" (No. 606, R. 73); that "*as our conclusion is that the practice under the Assigned Car Rule is not per se preferential or discriminatory, the question remains whether the report justifies the conclusion that the right to their use has been exercised by the railroads in such a discriminatory and preferential manner as to justify the conclusion, it must be abolished in toto in order to eradicate discriminatory practices and preferences. In examining the several charges of preference and discrimination, we do not find that that conclusion has support in view of the universality of the order*"; that

"while the Commission finds that on three railroads mentioned in the report private car mines during car shortage in 1922 received practically a full car supply, while other mines on the same division of the same railroads received a comparatively small percentage of the cars ordered, it is not found that this was the result of any undue preference of private cars but was caused by abnormal conditions, particularly the strike of the railroad shopmen and the bituminous coal miners" (No. 606, R. 74); that "*We find no substantial foundation of preference and discrimination upon which to base the universal scope of the order. Through its operation the railroads will be deprived of the use of their mines and of their right to exercise their judgment in procuring their coal supply and the other plaintiffs of the use of their mines and their private cars*" (No. 606, R. 74); that "The owners of private cars have acquired valuable property rights in order to carry on vast industries serving the public with its necessities in reliance upon the Assigned Car Rule, and as the order in question necessarily makes no provision for compensating the owners for the deprivation of their property, it is manifest that its effect is the taking of property without compensation, and in violation of the Fifth Amendment to the Constitution" (No. 606, R. 74).

Thus, the learned District Court repeatedly condemns the order because of its *universality*. But

what about the *universality* of the statute which the District Court failed to consider (No. 606, H. 67):

> We find it, however, unnecessary to base our conclusions in the case upon the construction of paragraph (12) of Section 1, *although its legislative history in connection with the administrative history of the assigned-car rule has a bearing upon the question of the reasonableness of the order of the Commission which is before us.*

The Court may have found it unnecessary to base any conclusions upon the construction of paragraph (12) but the carrier does not hold such a fortunate position.

ERRORS ASSIGNED

The errors assigned are substantially the same in all of the cases. Summarized, they challenge the action of the specially constituted District Court, first, in holding the order was beyond the Commission's power; second, in annulling and permanently enjoining the same; and, third, in failing properly to consider paragraph (12) of Section 1.

SUMMARY OF ARGUMENT

I. The power of Congress to abolish the assigned car rule by statute, or to authorize the Interstate Commerce Commission to abolish it, is not open to question. The matter here is one of statutory construction. Prior to the Transportation Act of 1920, the Commission by order had prescribed a rule of car distribution, which in prescribing the rule that

private, foreign railway fuel and company fuel cars should be taken into account, qualified it by expressly authorizing a railway to deliver to a mine *all* of the cars assigned to it, even if the number exceeded the mine's *pro rata* share of available cars. That order was sustained (*I. C. C.* v. *Illinois Central,* 215 U. S. 452). No further legislation was needed to authorize the continuance of that rule.

II. That further legislation was passed in 1920 must be accepted as showing the intention of Congress either to change the existing rule itself or authorize the Commission to do it. What Congress did in sub (12) of Section 402 of the Transportation Act was to adopt that part of the existing rule which required each and every car to be counted, but *to omit what this Court* (in *I. C. C.* v. *Ill. Central Ry. Co., supra*) *described as a qualification of the rule,* viz., that all private cars assigned to a mine might be delivered to it, though in excess of its *pro rata* share of available car supply. This Court in the case referred to (p. 465) makes it clear that the general scope of an order requiring that all cars must be counted would require them to be counted for all purposes, and would prohibit delivery to any mine of assigned cars in excess of its *pro rata* share of all available cars, and makes it clear that to avoid this effect of a general requirement that all private cars be counted, it is necessary that there be an express qualification permitting delivery to a mine of all cars assigned to it. In other words,

Congress in sub (12) has adopted the general requirement without the qualification. There is nothing in sub (12) which qualifies the requirement that in periods of car shortage "each and every car furnished to or used by any such mine for transportation of coal shall be counted against the mine."

III. If the private cars are to be counted in determining the available car supply, as they must, and are thus counted in determining the *pro rata* share of each mine, the necessary consequence is that no mine shall have furnished to or used by it more than its *pro rata* share of all the cars entering into the computation and that against that share all assigned cars shall be counted.

The language of the statute seems to require this method to be followed. But if it does not, it certainly does not require that any rule of car distribution prescribed by the Commission must allow mines to use all private cars assigned to them. In other words, there is nothing in the statute justifying the conclusion that Congress intended to crystallize the Hocking Valley-Traer rule into a statute and deprive the Commission when prescribing rules for car distribution, of the power to modify it. If the Act of 1920 was intended to leave the subject to the Commission, the amendments to §402 were obviously to broaden, not restrict the Commission's powers.

IV. The antecedent history of the assigned car rule as disclosed by the reports of the Commission;

the purpose of paragraph (12) as stated in the House Report when reported by the Committee, referred to by Commissioner Eastman, 80 I. C. C. 563; the opinions of the courts in the various cases relating to assigned cars and to transportation under priority orders, and the Resolution of the Senate (*Assignment of Freight Cars*, 57 I. C. C. 760) all permit of no other construction of the statute than that it abolished the assigned car rule absolutely.

V. Under the definitions of "transportation" and "car service," the assigned car constitutes a part of railroad transportation equipment and in no respect differs with the other cars which pass over the lines. When the carrier uses these cars in transportation, neither the Government nor the Commission is bound to pry beneath labels to ascertain their status. The law has fixed the status and that is the end of the matter (*Chicago Refrigerator Co.* v. *Commission*, 265 U. S. 292; *Ellis* v. *Commission*, 237 U. S. 434).

Neither the Congress nor the Commission has condemned or ordered out of service a single private car. The most the statute and the order of the Commission undertake is to regulate the use of that car in transportation. The carrier and private-car owner may take the private cars off the railway lines, but when found there, in periods of car shortage they must be distributed and used as prescribed in the statute and the Commission's order as part of the equipment available to the rail-

way. They may not remain on the line as private cars for the preferred use of these appellees. Private cars are subject to demurrage charges as any other (*Swift & Co.* v. *Hocking Valley*, 243 U. S. 281), even though standing on the private tracks of the shipper in its yards (*Procter & Gamble* v. *United States*, 225 U. S. 282, reversing 188 Fed. Rep. 221, 228).

VI. By private agreements with shippers carriers may not disable and obstruct themselves from complying with the car-service act and the orders of the Commission. Shortage of equipment is not a justification for violating the law. Emergencies create the opportunities for violations which the law was designed to prevent (*Avent* v. *United States*, 266 U. S. 127; *United States* v. *Koenig Coal Co.*, 270 U. S. 512; *United States* v. *Michigan Portland Cement Co.*, 270 U. S. 521). In times of car and coal shortage (*United States* v. *Railway Employees*, 283 Fed. Rep. 479, 286 Fed. Rep. 228, 290 Fed. Rep. 978), there might well be more rigorous enforcement of the law as the opportunities for profiteering are greater than in normal times. The position of being able to take advantage of calamities should be strictly policed.

VII. In form the report and order of the Commission are not unlike those in other cases in which the statute provides similar penalties for violations (*Baltimore & Ohio* v. *Commission*, 221 U. S. 612; *Pipe Line Cases*, 234 U. S. 548; *United States* v. *Union Stock Yard Company*, 226 U. S. 286).

VIII. As to the railroads, not a single witness testified that if this order was sustained and a car shortage occurred his company would be compelled to cease operations; the most that any witness claimed was that the order affected the company in acquiring its fuel supply and new arrangements would be necessary; some of them had already made new arrangements. Moreover, from past experience it may be assumed the Commission will at all times discharge i duty toward the carriers to the end that they may continue operations. At least one leading coal-carrying road, an appellee here, does not operate the assigned cars on its lines (Norfolk & Western, 80 I. C. C. 560).

IX. The private car owners claim no more than that their business operations will be interfered with and they will suffer financial losses in both plant operation and investment. If the order is sustained, the question of the disposition of their cars, as was the acquisition thereof, remains with them. If the cars shall stand idle and deteriorate, as they repeatedly allege, that is their affair. No governmental agency forced them to acquire the cars and none may force them to sell or rent them to the carriers. They have the right to allow them to stand idle. As practical business organizations, it may fairly be assumed their losses will not be as great as the allegations of the several petitions would seem to indicate. In any event, the same argument was advanced in *Commodities Clause Cases*, 213 U. S. 366, 405, in which this Court said:

"We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, * * *. We do this because obviously mere suggestions of inconvenience or harm are wholly irrelevant."

The practice of the carrier in dealing in the products which it carries and of the shipper in participating in the carriage of the products in which it deals has always been obnoxious to the public interest. The Commodities Clause drove the railway carriers out of the coal business. The car service act will drive private shippers out of preferred transportation and will clear the transportation system of these incubuses. If the railway carrier may not become a coal operator, *a fortiori*, the shipper should not be allowed to take away the railway's transportation.

ARGUMENT

I

THE STATUTE ABOLISHED THE ASSIGNED CAR RULE AND THE ORDER OF THE COMMISSION IS THE COMPLEMENT OF THE STATUTE

A rule of car distribution which has been so seriously controverted over such a long period of time can not possibly be in the public interest.

The situation had reached such an acute stage that special legislation was necessary to relieve it. Accordingly Congress passed the car service act.

The term "transportation" * * * shall include * * * cars * * * irrespective of ownership or of any contract, express or implied,

for the use thereof, * * *. (c. 91, 41 Stat. 475.)

Section 402, Transportation Act of 1920, amended Section 1 of the Interstate Commerce Act by adding thereto the following paragraphs:

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act (c. 91, 41 Stat. 476).

(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful (c. 91, 41 Stat. 476).

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable

> ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine (c. 91, 41 Stat. 476).

The significant connoted sentence would indicate that it was the Congressional intention to abolish the assigned car rule absolutely, thus:

> Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States (c. 91, 41 Stat. 476).

The House Committee Report, November 10, 1919 (Vol. 2, 66 Cong. 1st Sess., 1919) states that paragraph (12) was for the purpose of "avoiding any possibility of the recurrence of the evil of what is known as 'assigned' cars," and twice states that the car service act was intended to "broaden the power of the Commission."

In *United States* v. *Koenig Coal Co.*, 270 U. S. 512, 520:

> The general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislature is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged.

See also *Lake County* v. *Rollins*, 130 U. S. 662, 670; *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 410.

The words "*and in respect of each car not so counted* shall be deemed a separate offense" and a forfeiture "of $100 for each offense" "may be recovered in a civil action brought by the United States" not only reaffirm the previous enactment but they doubly express the Congressional intent. Thus, the carrier shall "count *each and every* car"; "and in respect of *each* car *not so counted*" shall be deemed "a *separate offense*" and the carrier shall forfeit "the sum of $100 for *each offense*."

Are the words "it shall be the duty of the carrier * * * to count each and every car furnished to or used by any such mine for transportation of coal against the mine" to be read as excluding the railway fuel cars and the private cars of all of these appellees which were the identical cars the Congress had long had before it and with respect to which it was undertaking specifically to legislate? With the history of the assigned cars before it, are we to assume that Congress passed a meaningless statute, that no change whatever was made and that paragraphs (10), (11) and (12) added nothing to then existing law?

To fail to consider paragraphs (10), (11) and (12) was to fail "to count each and every car," and, hence, to ignore the Government's case entirely. It is difficult to conceive how the Court may separate the *universality* of the order from the *universality* of the statute, for they are one and the same. The court may fail to consider paragraph (12) but the carrier enjoys no such fortunate position. The

District Court concededly put the statute out of the case, as in no other way could it annul the order on the conclusions which it reached. In the very outset the District Court stated the Commission had based its orders on paragraphs which included (10), (11) and (12), thus (No. 606, R. 56):

> The Commission bases its order upon the legal conclusion that the Assigned Car Rule, as practiced by the railroads, is an unjust and unreasonable regulation and practice prohibited by paragraphs (3), (6), (10), (11) and (12) of Section 1 of the Interstate Commerce Act, added to that Section by the Transportation Act of 1920, and discriminatory as giving to the mines receiving assigned cars an undue and unreasonable preference and advantage over other mines, prohibited by Section 3, and that the discontinuance of the rule is within the power of the Commission under Section 1, Paragraph (14) and Section 15. That it has power to determine what is a just and reasonable rule of distribution of cars among the coal mines served by any carrier by railroad prescribed by Paragraph (12) of Section 1, also added by the Amendment of 1920.

Opposing counsel maintain that paragraph (12) must be construed. They would contend the paragraph is meaningless on its face; that sources *aliunde* must be resorted to to aid in its interpretation and construction. Opposing counsel concede they are driven to sources other than the face of the statute to argue for the assigned car rule.

If they can not sustain the rule on the face of the statute, they are not entitled from other sources at the hands of the Court to the preferences and discriminations which the Commission vigorously condemned. The Court will not look to other sources to dig up material by which to amend the statute by adding the words "it shall be the duty of the carrier * * * to count each and every car furnished to or used by any such mine for transportation of coal against the mine *except the private cars and the railway fuel cars of these appellees.*"

This Court will not assume that in enacting the Transportation Act the Congress did not act with deliberation and failed to express with clearness its full meaning to such an extent that the Court must turn back to the dark pages of rebates, preferences and discriminations and dig out the construction which these several groups of appellees claim the Congress intended they should have.

If these private car owners may let their cars to the carriers and thereby secure preference and advantage in their exclusive use, why may they not also build or purchase tracks for lease to the carriers and likewise secure their preferred use?

Under the definition of "car service" the assigned cars constitute a part of railroad transportation equipment. The statute so declares. They in no respect differ with other cars which pass over the tracks. Their status is not changed by

labels. This court has so held (*Chicago Refrigerator Co.* v. *Commission*, 265 U. S. 292; *Ellis* v. *Commission*, 237 U. S. 434).

These railway fuel cars and private cars are used in transportation within the meaning of the statute. They are not partly in and partly out of transportation and to like extent within and without the statute. The term "transportation" includes "cars, * * * irrespective of ownership or of any contract, express or implied, for the use thereof, * * *."

The Congress adjudged "it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines." In order to accomplish that result the carrier is further directed "to count each and every car furnished to or used by any such mine for transportation of coal against the mine." The words are continuous. They have a definite and positive meaning of their own. Obviously the Senate thought so, else why its resolution (*Assignment of Freight Cars*, 57 I. C. C. 760). Viewed through the eyes of either Congress or the Commission the result is the same. Either view sustains the order. The order deals with the assigned car subject in its entirety and dispenses with wholesale prosecutions for recovery of forfeitures. The plaintiffs can have no valid objection to its form.

The Commission has not ordered out of service a single private car. The most the statute and the

order of the Commission contemplate is the regulation of the use of that car in the transportation service.

Whether Congress has the power to abolish absolutely the use of the private car and thus to divorce completely business and transportation, as it undertook to do by the Commodities Clause, is a question which is not here.

Under the car service act, these cars become a part of the carriers' general pool of equipment the instant they go out upon the tracks. In executing the car service act the Commission is not bound to pry beneath labels on cars to ascertain the nature of private agreements between carriers and preferred shippers. Private cars are subject to demurrage charges as any other, *Swift & Co.* v. *Hocking Valley,* 243 U. S. 281, even though standing on the private tracks of the shipper in its yards, *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, reversing 188 Fed. Rep. 221, 228.

See "Transportation" as defined in Section 1 (app. 77).

United States v. *Union Stock Yard,* 226 U. S. 286.

Chicago & Alton Railroad v. *Kirby,* 225 U. S. 155.

Louisville & Nashville Railroad v. *Mottley,* 219 U. S. 467.

Armour Packing Company v. *United States,* 209 U. S. 56.

New Haven Railroad v. *Interstate Commerce Commission,* 200 U. S. 361.

United States v. *Koenig Coal Co.*, 270 U. S. 512.

United States v. *Michigan Portland Cement Co.*, 270 U. S. 521.

Paragraph (21) of Section 1 of the Act to Regulate Commerce, as amended by Section 402 of the Transportation Act of 1920, provides (c. 91, 41 Stat. 478):

> The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, * * *.

The power and authority of the Commission to direct carriers to provide equipment is specific. The carriers are subject to the directions of the Commission. If they make themselves subject to directions of private shippers by special agreements, the power of the Commission is not thereby destroyed. They may not serve the Congress and the Commission and the private car owners at one and the same time.

Chairman Aitchison, Commissioners McChord, Meyer, Esch and Lewis concurred in the first report and order and found (80 I. C. C. 562, 563):

> Upon the facts shown of record we find and conclude that in the distribution of cars

for transportation of coal among the bituminous coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is and for the future will be, unjust and unreasonable and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all

> mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

These findings were affirmed and repeated in substantially the same words in the second report (93 I. C. C. 737).

Commissioners Eastman and Campbell joined in a concurring report written by the former in which they found (80 I. C. C. 563):

> I am unable to escape the conclusion that it was the intent and is the meaning of this provision that in times of car shortage every mine should be limited to a pro rata share of the available car supply, and that in computing this share every car furnished to the mine, whether private car or railroad-fuel car or car for commercial loading, should be counted. Under the assigned-car practice now in effect, however, it appears that the number of such cars placed in a mine may, and often does, exceed its pro rata share of the available car supply. It does not seem to me that in such cases the cars are being counted "against" the mine. The purpose of paragraph (12), as stated by the House committee when it was reported, was to avoid "any possibility of the recurrence of the evil of what is known as 'assigned cars.' "

These seven Commissioners concurred in the order which was entered, Commissioner Eastman

simply giving added reasons. Commissioners Hall, Daniels, Potter and Cox dissented. Thus the entire Commission voted. In the second report Commissioners Hall, Potter and Cox only dissented. Commissioner Daniels had resigned and was succeeded by Commissioner McManamy who voted with the majority.

II

THE DECISIONS OF THE COURTS

In *Baltimore & Ohio Railroad* v. *Lambert Run Coal Company,* 267 Fed. Rep. 776, the United States Circuit Court of Appeals for the Fourth Circuit (Circuit Judges Pritchard, Knapp, and Woods) construed paragraph (12) and took into consideration the response of the Commission to the Senate Resolution (see 80 I. C. C. 529). In delivering the opinion, Circuit Judge Woods said (267 Fed. Rep. 779):

> Attached to the answer is an elaborate written response of the Commission to a Senate resolution directing the Commission to inform the Senate upon what authority, if any, its order or notice of April 15, 1920, was issued. Therein the Commission relied particularly for its authority on the provisions of subdivision 15 which we have italicized.
>
> * * * * *
>
> (1) We can not doubt that by subdivision 12 of section 402 the Congress clearly expressed the intention to abolish all preference to mines furnishing railroad fuel coal

under the assigned car rule in periods of ordinary car shortage. The count of each and every car required is not a mere independent futile enumeration, but a count of each and every car furnished or used against the mine, to the end that there should be proportional distribution of all available coal cars, resulting in fair and equal opportunity to each mine on the basis of its rating. Before the enactment of the statute the matter had been controlled by rules, regulations, and practices made by railroads, or the Government Railroad Administration, which had been the subject of much controversy. Evidently the Congress, having in view this controversy, after full consideration settled the matter by an imperative enactment against the assigned car rule in times of ordinary coal-car shortage. Thus it appears to us the rules of the Interstate Commerce Commission above set out are not in accord with subdivision 12 of the Transportation Act of 1920, standing alone.

The force and effect of the opinion of the Circuit Court of Appeals is claimed to be impaired because of the subsequent reversal *for want of jurisdiction* (*Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U. S. 377), and that single District Judges held to the contrary in *Corona Coal Company* v. *Southern Railway*, 266 Fed. Rep. 726, and in *Cleveland & Western Coal Company* v. *Baltimore & Ohio*, 283 Fed. Rep. 995.

The opinion of the Circuit Court of Appeals expressed the views of the three eminent judges who concurred. The opinion is none the less persuasive because the decree was reversed on other grounds.

The reasons underlying the report of Commissioners Eastman and Campbell and the opinion of the United States Circuit Court of Appeals are not inconsistent with the ultimate findings of the Commission which sustain the order in this case. In their brief in this Court (p. 111) in these cases the counsel for the Commission say: "The *Lambert Run case* can furnish no comfort to appellees herein, because according to that decision the law itself requires what the Commission has ordered in the *Assigned Car case*, namely, pro rata distribution."

United States v. *New River Company*, 265 U. S. 533, 537, known as the *Joint Mines case*, arose in this way: Chesapeake & Ohio Railway and Virginian Railway, competing carriers, served the New River District. A mine served by one carrier is called a "local mine" and a mine served by two or more carriers a "joint mine." Car service rules were promulgated to govern uniformly the "ratings" of coal mines, other than anthracite, and car distribution to such mines during periods of car shortage. The daily rating of a local mine for any month is based on its tonnage shipped during the preceding month and is identical with its daily capacity to produce coal. The rating of

a joint mine is calculated in the same way that the daily rating of a local mine is determined, except that its shipments over all carriers serving it are considered in determining its total capacity to produce coal. The figure so ascertained is called the "gross daily rating" in recognition of the fact that the rating of a joint mine does not represent its capacity to ship over each carrier on days when it uses more than one, but on the contrary represents its total daily capacity to ship over all lines which serve it. Rule 4 of Car Service Rules provided: "Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with a designated representative of each such carrier. *Such combinations must not exceed the gross daily rating of the mine.*" Under the rules, when a mine ordered less than its rating, distribution to it was on the basis of its orders. The railway carriers sought to discontinue rule 4 and to substitute for it the so-called "150 per cent rule" which the Commission in 1912 had found to be a reasonable rule for the Illinois Central Railroad, but which had never been followed by the railroads generally or by the defendant carriers. Under that rule a joint mine may order 100 per cent of its gross daily rating from either carrier serving it and is entitled to receive its pro rata share of that carrier's available cars and, if it so orders, it is not entitled to any cars from the other carrier. In this respect it does not differ from rule 4.

However, if a joint mine served by two carriers orders cars from both on the same day, it is entitled to order from each carrier 75 per cent of its gross daily rating, making its combined orders 150 per cent, but subject to the limitation that it is not entitled to receive in the aggregate more than its gross daily rating. The Commission declined to give permission to substitute the 150 per cent rule for rule 4. The District Court issued an injunction and suspended rule 4 (293 Fed. Rep. 460).

In view of the opinion of this Court, which reversed the opinion and decree of the District Court, the dissenting opinion of Circuit Judge Woods in the District Court (who wrote the opinion in the *Lambert Run case*) is pertinent (293 Fed. Rep. 467, 468).

On appeal the injunction decree was reversed and on the mandate to the District Court the bill was dismissed. This Court said (265 U. S. 533, 541, 542):

> Appellees contend that each operator of a joint mine has a legal right to its fair share of the car supply of each carrier serving the mine; that the operator on any day may offer the prospective output of the mine to any carrier serving it and is entitled on that basis to its share of the carrier's available cars, and that, if any portion of the output remains, the operator may offer it to the second carrier and is entitled to a fair share of that carrier's available cars. This

practice is forbidden by rule 4, approved by the order of the Commission. The court below held the order invalid as discriminatory in that it deprived the operator of a joint mine of an advantage to which it has a legal right.

The Interstate Commerce Act confers power on the Commission to regulate the distribution of cars. See § 1, (3), (4), (6), (10), (11), (12), (14); § 3 (1); § 15 (1). And its jurisdiction over the subject is exclusive. *Interstate Commerce Commission* v. *Illinois Central R. R., supra,* 472; *Baltimore & Ohio R. R.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 493; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 304, 313; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121, 131, 133; *Pennsylvania R. R. Co.* v. *Clark Coal Co.,* 238 U. S. 456, 468; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.,* 242 U. S. 298, 300. The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission* v. *Illinois Central R. R., supra,* 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* 547; *Kansas City Southern Ry.* v. *United States, supra,* 456; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States, supra,* 488.

Under rule 4, an operator of a local mine is entitled on the basis of its daily rating

> to its pro rata share of the available cars of the carrier serving it. An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier, but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which at the time has the better car supply and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections and markets it desires to have. The determination of the Commission in favor of rule 4 can not be said to be so arbitrary or unreasonable as to transcend the power conferred upon it in respect to car distribution. The contention that the order of the Commission deprives operators of joint mines of their property without due process of law is without merit.

Here is a direct holding based on the issues drawn by the parties that the Interstate Commerce Act "confers power on the Commission to regulate the distribution of cars," that "its jurisdiction over the subject is exclusive," and that "the courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions."

Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452, was decided ten years prior to the enactment of paragraph (12). That case grew out of the *Hocking Valley* and *Traer*

cases, *supra*. Mr. Chief Justice White pointed out (215 U. S. 461) that "Neither the method by which capacity was to be ascertained nor the regulation for daily distribution upon the basis of such capacity in case of shortage was identical among the various railroad systems" and that "The divergence, and even conflict, between those systems is illustrated" by the cases which he cited. The order of the Commission in that case (215 U. S. 465) "not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars." The general scope of the order was qualified by expressly authorizing the railroad company "to deliver to a particular mine all the foreign railway fuel cars, the private cars, and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the *pro rata* share of the mine the order only permitted the carrier to add a sufficient number of system cars to make up the rightful *pro rata* number" (215 U. S. 465). The preferences and discrimi-

nations which were condemned by the Commission were referred to in the opinion and are in all respects substantially the same as those condemned in the instant case (215 U. S. 466, 467). The Illinois Central assailed the validity of the order. The Circuit Court (Circuit Judges Grosscup, Baker and Kohlsaat) enjoined the order in part, and on the appeal of the Commission the Chief Justice pointed out the posture of the case before this Court (215 U. S. 472). The District Court had held that the Illinois Central and other railroad companies were not entitled to relief in so far as the order of the Commission concerned the counting of foreign railway fuel cars and private cars, but that the railway companies were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they directed the taking into account of the cars employed by the companies in hauling their own fuel. In that case the counsel for the railroad companies stated that "*no question was raised by the railroad companies as to the validity of the order of the Commission to the extent that it controlled private cars and foreign railway fuel cars*" (215 U. S. 469).

After observing that the failure of the railway companies to appeal from that part of the order of the Circuit Court which sustained those portions of the order of the Commission which concerned foreign railway fuel cars and private cars,

and whether, if those subjects were not open, they do not necessarily carry with them the question of company fuel cars, on the ground that the three classes rest upon one and the same consideration, and that to divorce them would bring about conditions of preference and discrimination which the act to regulate commerce expressly prohibits, the Court said (215 U. S. 472):

> When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under the conditions stated is not commerce, it is therefore not within the authority delegated to the commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce.

In overruling *in toto* every contention advanced by the railway carriers, this Court said (215 U. S. 474):

> It may not be doubted that the equipment of a railroad company engaged in interstate

> commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.

Baltimore & Ohio Railroad v. *Pitcairn Coal Company,* 215 U. S. 481, was decided with the *Illinois Central case,* and was a part of the same day's proceedings.

Morrisdale Coal Company v. *Pennsylvania Railroad,* 230 U. S. 304, 312, 313 (italics ours):

> The prohibitions of section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910 it was said (19 I. C. C. 387) that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines, should be counted in making the distribution.

Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. *Traer* v. *Chicago, &c., R. R.*, 13 I. C. C. 451; *Hillsdale Coal Co.* v. *Pennsylvania R. R.*, 19 I. C. C. 356, 372; *Jacoby* v. *Pennsylvania R. R.*, 19 I. C. C. 392; *Minds* v. *Pennsylvania R. R.*, 20 I. C. C. 52.

It was, however, recognized that there could be no hard and fast rule and that *circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refuse to haul certain articles of merchandise in order to supply communities with necessaries of life.* *Parks* v. *Cincinnati &c. Ry.*, 10 I. C. C. 47; *Thompson* v. *Pennsylvania R. R.*, 10 I. C. C. 640.

These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was dis-

tinctly so ruled in the *Pitcairn case,* 215 U. S. 481, and in *I. C. C.* v. *Illinois Central,* 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated.

Pennsylvania Railroad v. *Puritan Coal Company,* 237 U. S. 121, 133, 134:

> Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that "if his coach be full" he was not liable for failing to transport more than he could carry. Hutchinson on Carriers, 146; *Lovett* v. *Hobbs,* 2 Shower, 127; *Riley* v. *Horne,* 2 Bing. 217; *Peet* v. *Ry.,* 20 Wisconsin, 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of

their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not, identically. In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered—whether perishable or staple, and whether a necessity of life needed in crowded cities and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true in *Morrisdale Coal Co.* v. *Pennsylvania Railroad,* 230 U. S. 304, 312–314.

In *United States* v. *New River Company, supra,* it was contended that the order of the Commission was an attempt to regulate the coal-mining industry. But the argument, "The law does not attempt to equalize fortune, opportunities or abilities" (222 U. S. 46), was so completely worn out with repetition that it became wholly ineffective. In all of the cases in which the assigned car rule has been the subject of controversy, the argument that the Commission's orders were attempts to regulate business were either ignored or rejected.

III

THE APPELLEES ARE NOT ENTITLED TO THE PREFERRED AND EXCLUSIVE USE OF THEIR CARS IN EMERGENCIES

The private-car owners are seeking a preference and advantage in the transportation of coal—a national necessity—in times of car shortage and the advantages which they claim, if allowed, might result in disaster to whole communities. The eventful days of 1922, when there existed both coal and car shortages (*United States* v. *Railway Employees,* 283 Fed. Rep. 479; 286 Fed. Rep. 228; 290 Fed. Rep. 978) may not readily be put out of mind.

The Commission found (80 I. C. C. 552, 553):

> The railroads are not the only agencies as to which the public interest requires that there shall be a steady supply of suitable fuel at a reasonable price. There are many important activities which labor under the same necessity as the railroads, who have not enjoyed the privilege of assigned cars, save during a few months in 1920 and 1922 when specially designated in certain individual cases by our emergency service orders, or as they may have employed private cars. Yet they have all continued to function. As illustrative, by our service order No. 23, in 1922, we classed equally with railroads other common carriers, the bunkering of ships and vessels, public utilities which directly serve the public under a franchise therefor, street and interurban railways (some of which are competitors of the steam railroads which use assigned cars), electric power and light, gas,

water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human foodstuffs; hospitals; the United States, State, county, and municipal governments, and their hospitals, schools, and other public institutions. The needs of the Army and Navy are important. If the railroads are to continue supplying their fuel needs by a continuance of the assigned-car practice as proposed, there is good reason we should consider extending the same privilege to some or all of the public utilities and quasi public utilities mentioned (80 I. C. C. 552, 553).

In the instant case the Commission again said (80 I. C. C. 563):

> It is not intended that this finding shall preclude the Commission hereafter, in proper cases, in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act, from requiring the placement of cars for bituminous coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide.

Assignment of Freight Cars, Senate Resolution No. 376, 57 I. C. C. 760, 766 (1920):

> Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, authorizes the Commission to direct priorities in

> transportation. If priorities were to be prescribed in transportation of bituminous coal it would obviously be necessary to give first priority to that for railway fuel, as was done when priorities were issued by the President's priority agent during the war.

These private-car owners may not be in business competition with the Navy, but they are certainly seeking a preference and advantage over the Navy in the acquisition of coal. They are asking similar preferences and advantages over waterworks, gas plants, and all other public utilities.

In Service Order No. 23, which this court held "had the force of law" (*United States* v. *Michigan Portland Cement Co.*, 270 U. S. 521, 525; *United States* v. *Koenig Coal Co.*, 270 U. S. 512; *Avent* v. *United States*, 266 U. S. 127) the order of the Commission prescribed five classes for priorities, as follows: 1. Such special purposes as may be specially designated by the Commission. 2. (*a*) Fuel for railroads and other common carriers and for bunkering ships and vessels; (*b*) for public utilities, including street and interurban railways, electric power and light, gas, water and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human foodstuffs; hospitals; (*c*) United States, State, county, or municipal governments, and for their hospitals, schools, and for other public institutions—all to the end that such common carriers, public utilities, quasipublic utilities, and governments may be kept

supplied with coal for current use for such purposes, but not for storage, exchange, or sale. 3. For Lake Erie and Lake Superior ports. 4. Commercial sizes of coal for domestic use. 5. Other purposes.

Observable is it that industries engaged in the manufacture of steel, coal-tar products, etc., could not possibly qualify for any of the first three classes. If the position of the private-car owners is sound, then for future days the private-car owners are immune from interference with preferential car supply in times of car shortage however severe. If their cars are not subject to regulation under other paragraphs of the car service act, they are certainly not subject to regulation under emergency paragraph (15), as the right to regulate them is the same under all. If these private cars are not a part of the carriers' transportation equipment under all circumstances, how may they be under any circumstances? They make of themselves preferred classes who take their coal supply above everybody, even the Government itself, including the Navy. The history prior to the enactment of the car service act may be searched in vain for any such intention of Congress.

Nor may the argument prevail that paragraph (15) may be torn from the other paragraphs of the car service act and made a separate and distinct subject. The car service paragraphs were never separated during the progress of the legislation in

Congress (Cong. Rec., Vol. 58, Pts. 1–9, p. 8529). They relate to a single subject and are specific.

The car service act and all of the sections thereof were intended to deal with the subject in all of its aspects and the paragraphs should be read and construed together. All paragraphs stand or fall together and the act may not be broken in pieces and sustained or emasculated according to the circumstances of the particular case. There is very little to encourage the appellees when they seek to dig out of history the favors which they claim the car service act confers upon them. Even if they find anything, they must convince the Court the statute allows them to have it.

The order of the Commission in the instant case fits paragraph (12) cap-a-pie. There is absolutely no inconsistency whatever between the two. Paragraph (12) was intended not only to cut down the plant of the assigned car rule but to cut up the roots from which it grew and the order of the Commission accomplishes precisely that. The order follows the statute. The wisdom, expediency or hardship of the order or whether the court agrees with all of the reasons given by the Commission or would have entered a different order if the court were sitting as the Commission, are subjects which, under the cases cited, the court will not consider.

IV

ORDERS SIMILAR IN FORM WHICH HAVE BEEN SUSTAINED IN OTHER CASES

The proceeding before the Commission and the form of its order followed similar procedure in other cases.

In *Baltimore & Ohio* v. *Commission,* 221 U. S. 612, bill was filed to enjoin an order which required carriers to file reports of violations of hours of service laws for which there were severe penalties provided. In sustaining the validity of the statute and the order of the Commission thereunder, this Court said (221 U. S. 622):

> To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employees who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose and are comprehended within the power of the Commission.

In *Pipe Line cases,* 234 U. S. 548, by the Act of Congress of June 29, 1906, c. 359, 34 Stat. 584, the Act to Regulate Commerce was amended so that the first section reads in part:

> That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and

> partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act.

The Commission after a hearing issued an order requiring the pipe-line companies to file with the Commission schedules of their rates and charges for the transportation of oil. The companies might well have been prosecuted for failure to file such schedules and the Commission's order was a precursor to prosecutions. *In the Matter of Pipe Lines,* 24 I. C. C. 1. The pipe-line companies then filed the bills to enjoin, alleging that the statute thus construed was unconstitutional (204 Fed. Rep. 798). The Commerce Court enjoined and on appeal to this Court the decree was reversed and the bills were subsequently dismissed. In that case this Court held (234 U. S. 561):

> The whole case is that the appellees if they carry must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. (*Hoke* v. *United States,* 227 U. S. 308, 323; *Lottery case,* 188 U. S. 321, 357.)

See also *United States* v. *Union Stock Yard,* 226 U. S. 286, in which the Government filed an original bill to compel by mandatory injunction the stock yard company to comply with the Interstate Commerce Act by publishing and filing tariffs;

and to enjoin the company from paying a bonus in violation of the Elkins Act to a shipper on condition that the latter would maintain its plant in the stock yards.

The foregoing cases indicate the course of the Commission was not unusual when it conducted an investigation of the assigned car rule and ordered the carriers to cease and desist without in the first instance resorting to prosecutions.

V

THE CAR SERVICE ACT AND THE COMMODITIES CLAUSE ARE COUNTERPARTS

In the *Commodities Clause cases*, 213 U. S. 366, 405, 406, this Court said:

> We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the Government has placed upon it. We do this because obviously mere suggestions of inconvenience or harm are wholly irrelevant, as they can not be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.
>
> Let it be conceded at once that the power to regulate commerce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow, and at all times in its plentitude must remain free from restrictions and limitations arising or asserted to arise by State

> laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be in and of themselves lawful regulations of commerce, if prospectively applied, nevertheless they can not be so considered, because of their retroactive effect upon the rights of the defendants alleged to have been secured by valid state laws. We further concede for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although by existing state laws the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

The Commodities Clause ordered the railway carriers out of the coal business. The car service act orders private shippers out of preferred transportation of coal.

The Commission calls attention to what is observable to all, that if the assigned car practice is

continued, within a short time railway carriers will be leasing motive power from large and powerful shippers for preferred operation on their lines. The Commission also found:

> The private-car owner is either entitled to the preference to the full extent of the carrier's willingness to accept his cars, or he is entitled to no preference whatsoever on account of that ownership, and a compromise is untenable (80 I. C. C. 561).

Appellees by the device of letting their private cars to the railway carriers at grossly inadequate rentals for the purpose of gaining the preferences and advantages which flow therefrom (93 I. C. C. 736) stand out in front as preferred and privileged classes. If they have that right under paragraph (12) they have the same right under paragraph (15). They should be compelled to take their place in the line in which all stand equal before the law. It is either the one or the other.

Swift & Co. v. *United States,* 196 U. S. 375, 402:

> It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

Pertinent here is the pronunciamento of Commissioner Hall, whose views have been frequently cited throughout these arguments, in his dissenting opinion in the *Interchangeable Mileage Ticket case,* 77 I. C. C. 201, 214, "Special privilege dies hard and the craving for it never dies."

Moreover, this case will be determined on the further doctrine announced in *Billings* v. *United States*, 232 U. S. 261, 284:

> That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed.

CONCLUSION

The opinion of the District Court was clearly erroneous and the decree entered in each of the five cases should be reversed with directions to the specially-constituted District Court to vacate the decree, dissolve the permanent injunction and dismiss the suit for want of equity.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

APPENDIX A

Section 400, Transportation Act of 1920, which amended section 1 of the Interstate Commerce Act, provides:

> (3) * * * The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * * (c. 91, 41 Stat. 474, 475).
>
> (4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transpor-

tation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers (c. 91, 41 Stat. 475).

* * * * *

(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable

terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful (c. 91, 41 Stat. 475).

Section 402, Transportation Act of 1920, further amended section 1 of the Interstate Commerce Act by adding thereto the following paragraphs:

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act (c. 91, 41 Stat. 476).

(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful (c. 91, 41 Stat. 476).

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car

furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States (c. 91, 41 Stat. 476).

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto (c. 91, 41 Stat. 476).

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it and the penalties or other sanctions for nonobservance of such rules, regulations, or practices (c. 91, 41 Stat. 476).

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have,

and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President

may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded (c. 91, 41 Stat. 476).

(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable (c. 91, 41 Stat. 477).

(17) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a

penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act (c. 91, 41 Stat. 477).

Section 3 of the Interstate Commerce Act provides:

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in and respect whatsoever (c. 104, 24 Stat. 380).

APPENDIX B

A SUMMARY OF THE COMMISSION'S FINDINGS SHOWING THE EVILS TO THE PUBLIC AND THE ADVANTAGES TO THE OWNERS IN THE PREFERRED USE OF RAILWAY FUEL AND PRIVATE CARS WHICH THE DISTRICT COURT APPARENTLY DISREGARDED.

"Further evidence of the advantage which private-car owners received from the preferential placement of their cars under the assigned-car rule is to be found in the fact that they are willing to lose many hundred thousands of dollars in the operation of their cars in return for the advantage of such preferential placement during car-shortage periods. The railroads pay to private-car owners an allowance of 1.5 cents per mile for use of their cars. This, it was testified, was hardly sufficient to pay the cost of repairs alone. (93 I. C. C. 736.)

The privately owned cars enjoy the use of a disproportionately large part of the facilities of the carriers. Private-car owners are accorded a greater use of the carriers' facilities than they should properly receive. (80 I. C. C. 560.)

The private cars usually move in train lots in shuttle service and avoid the additional switching and spotting service necessary in furnishing a like amount of transportation to the numerous mines shipping commercial coal in system cars. (80 I. C. C. 561.)

Coal in private cars under the present arrangements is susceptible of easier movement than similar shipments in railroad cars because it usually moves regularly between the same points in large or trainload lots, which indicates the greater likelihood that such cars will receive preferred treatment. (80 I. C. C. 561.)

The privately owned cars are placed at certain mines to be loaded with coal for the owner's use from day to day and system cars are placed at the same mines on alternate

days; if on the days on which such private cars are placed they exceed the *pro rata* share of cars to which that particular mine would be entitled if dependent wholly upon system cars, no subsequent adjustment of such overage is made. (80 I. C. C. 561.)

Assigned-car mines which furnish their output for long periods of time to railroads are, at the end of such periods, because of lower costs and better labor conditions which they have enjoyed, in a position to undersell competing unassigned-car mines. (93 I. C. C. 717.)

Railroad-owned mines in many instances sell coal commercially and actively engage in selling commercial coal. (93 I. C. C. 717.)

One effect of the assigned-car rule is to diminish the supply of cars at commercial mines. (93 I. C. C. 718.)

The conclusion that the supply of cars at commercial mines would be increased by abolishing the assigned-car rule due to the gross inequality of treatment as between assigned-car mines and unassigned-car mines is fully warranted. (93 I. C. C. 720.)

The result of the inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production and the amount of such increased cost is considerable and important. (93 I. C. C. 721.)

The wastage during periods of car shortage, which results from the holding over from one day to the next of cars set for loading, is somewhat greater at mines which use the railroad or private assigned car than at commercial mines. (93 I. C. C. 721.)

To permit private-car owners to have their cars placed at designated mines in excess of the *pro rata* allotment means that private-car owners will receive more than their fair share of those transportation facilities which they do not own. (93 I. C. C. 732.)

The record indicates that the increase in the ownership of the private cars within recent years has largely been

on the part of the public utilities, the steel plants, and the by-product gas producers, many of whom sell their gas directly or indirectly for public consumption. (80 I. C. C. 558.) With each of these classes of owners, steadiness of production is highly important; they are large users of specialty forms of coal, frequently of a high grade, and often compete keenly among themselves for the coal of certain preferred varieties found in particular fields. It is significant that the fuel cost is either passed on directly to the customers of this class of users, or is capable of absorption in the manufacture cost. The consequences of the assignment of private cars are more strongly felt in certain localities than in others. On some railroads the question is relatively unimportant. Upon certain divisions of the Pennsylvania, the Louisville & Nashville, and the Chesapeake & Ohio the private cars are a considerable proportion of the whole. It is abundantly made clear from the record that as competition becomes more keen more and more the public utilities, steel producers, manufacturers of by-product gas, automobile manufacturers, certain chemical manufactures, glass works, and other industries likewise absolutely dependent upon a steady supply of coal, rather than face ruin each recurring coal-car shortage, will be compelled to acquire private cars which they may have assigned. The result is not only an increasing gross inequality between users of this form of equipment who are able to afford the very considerable expense in procuring and maintaining such equipment, reflected immediately in the disproportion between the amount of their output or consumption as the case may be, but also that the available facilities of the railroad carrier other than cars—locomotives, tracks, and terminals—are taken up in great degree by such classes of preferred users, so that the commercial mines are and will find themselves unable to procure transportation for even the ratable share of the cars which the carrier owns and sets for them. If the practice is continued, it is not too much to expect that in future periods of car shortage due to insufficient motive power, strikes of maintenance-of-equipment employees, and like causes, the scramble for coal on the part of users who

can afford to pay the price will lead to the effort to assign privately owned locomotives and train crews privately employed in the manner in which privately owned cars are now assigned. During the car shortage of 1922 we received requests to this effect. (80 I. C. C. 558, 559.)

The effect of the use of the assigned car for railway fuel is to diminish to some extent the supply of cars placed at commercial mines during periods of car shortage. (80 I. C. C. 542.)

The result of the inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production. As it is the commercial supply of bituminous coal which is restricted by the free use of the assigned car, the increased costs are most sharply felt in coal intended for commercial consumption. (80 I. C. C. 550.)

During car shortage periods private-car mines on the Louisville & Nashville, Chesapeake & Ohio and Pennsylvania received practically a full car supply, while other mines on the same division of the same railroad received a comparatively small percentage of the cars ordered. Private-car owners themselves, in introducing evidence as to the necessity of the assigned car privilege, showed in many instances the discriminatory effect of the rule. (93 I. C. C. 735.)

Fordson Coal Company, a subsidiary of Ford Motor Company, owns a mine on the Louisville & Nashville. For the six months' period prior to the first placement of its private cars at its mine in February, 1923, it had a car supply of approximately 22 per cent at its mine and was able to produce only about 34,000 tons of coal a month. In March, with practically a full supply of private cars, it was able to produce about 72,000 tons, although the car shortage continued. In three months' time the costs per ton were decreased about one-half. (93 I. C. C. 736.) During the period when the Fordson Coal Company was dependent upon system cars other private-car owners in the same district received practically a full supply of private cars at their mines.

Advantages which owners derive from the preferential placement of their private cars under the assigned-car rule are further evidenced by the losses which they are willing to take in the operation. They receive an allowance from the rail carriers of only 1.5 cents per mile, which is hardly sufficient to pay the cost of repairs.

For illustration, Westmoreland Coal Company which alleges that it owns 2,012 open-top cars, value approximately $4,000,000, with its mines located on the Pennsylvania Railroad (No. 709, R. 4) showed that for the two years and nine months ending September 30, 1923, the revenues received for the use of its 2,019 (93 I. C. C. 736) cars were $784,424; expenses for repairs, $820,755; total expenses, including interest and depreciation, $1,329,488. The net loss to the company was $545,064, or a loss per ton of coal handled in private cars of 18 cents in 1921, 13 cents in 1922, and 8 cents in 1923. (93 I. C. C. 736.)

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THE ASSIGNED CAR CASES
Nos. 638, 713, 714, 715, 716.

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IN THE

Supreme Court of the United States

October Term, 1926.

No. 638

POCAHONTAS OPERATORS' ASSOCIATION, et al.,

vs.

THE AKRON, CANTON AND YOUNGSTOWN RAILWAY COMPANY, et al.

No. 713

POCAHONTAS OPERATORS' ASSOCIATION, et al.,

vs.

BERWIND-WHITE COAL MINING COMPANY, et al.

No. 714

POCAHONTAS OPERATORS' ASSOCIATION, et al.,

vs.

BETHLEHEM STEEL COMPANY, et al.

No. 715

POCAHONTAS OPERATORS' ASSOCIATION, et al.,

vs.

RAINEY-WOOD COKE COMPANY, et al.

No. 716

POCAHONTAS OPERATORS' ASSOCIATION, et al.,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

BRIEF OF GREEVER AND GILLESPIE ON BEHALF OF THE APPELLANTS.

GREEVER AND GILLESPIE,
Counsel for appellants,
Pocahontas Operators' Association, et al.
E. L. GREEVER, *of counsel.*

W. F. ROBERTS CO. WASHINGTON D. C.

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vs.
PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

BRIEF OF GREEVER AND GILLESPIE ON BEHALF OF THE APPELLANTS.

While these cases have been given separate titles and numbers, they are, in reality, but separate appeals in cases Numbers 606, 709, 710, 711 and 712, in which the appellants in these cases were interveners on the side of the United States and of the Interstate Commerce Commission. All of the said ten separately numbered cases have been set down for argument as one case.

GROUNDS OF JURISDICTION OF THIS COURT.

Due to the above stated status of these cases, the grounds on which the jurisdiction of this Court is invoked are the same as in said Nos. 606, 709, 710, 711 and 712, and these appellants adopt the statement thereof made in those appeals on behalf of the United States and of the Interstate Commerce Commission as their own, without repeating it here.

STATEMENT OF THE CASES.

Likewise, these appellants adopt the statements of the cases made in Nos. 606, 709, 710, 711 and 712 on behalf of the United States and of the Interstate Commerce Commission, as their own, without repeating them in this brief.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

These appellants rely upon all of their assignments of error and will urge all of them, for the reason

that they are so intimately connected that it is only upon consideration of all that the real attitude of the trial court can be understood and the fundamental error of that Court, responsible for the specific errors assigned, fully shown. In the nature of the case, these errors must be discussed as a whole, rather than separately, in order to give full effect to all.

What the trial Court did, (9 Fed. Rep., 2nd Series, 429), was to substitute its judgment, not "informed by experience," for that of the Commission, and, therefore, found that the Commission's order of June 13, 1923, affirmed by its order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

That Court also finds that the Commission "undertakes by indirection to regulate the soft coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the Commission." The only evidence in the record upon which this finding could possibly have been predicated is the evidence showing the ill effects and losses to other shippers resulting from the use, under existing car distribution rules, of privately owned coal cars, the evidence establishing the fact of undue prejudice and discrimination against such other shippers. The Court seems to hold that the relief from these effects and losses which the Commission's order would give is an attempt "to regulate the soft coal industry." In other words, the Court seems to hold that evidence showing the results of discriminatory and prejudicial

rules and practices cannot be the basis for correcting those rules and practices because it affects the industry. To illustrate: the evidence shows, (R 935, 1270), that where two coal mines are operating close together, one of which has assigned cars, either cars for railroad fuel or privately owned cars, in times of car shortage the first may run full time while the other may run only one or two days a week, one of the results being that men will leave the second mine and go to the first. This abandonment of the second mine by labor constitutes a serious loss to that mine and it is clearly and unmistakably due to the distribution of the coal cars to the two mines under existing rules, which is strictly a matter of "transportation service." The change in the "transportation service" which would be affected by the Commission's orders would simply *restore* the two mines to the normal basis of equal service. The fact that the evil results of the existing rules would cease is no ground for the finding that the Commission "undertakes by indirection to regulate the soft coal industry." The trial Court's holding is equivalent to holding that the Commission is without power to relieve from discrimination, because to do so would also destroy the effect of that discrimination.

The trial Court goes even further and holds that the advantage possessed by owners of private coal cars, in that they, by such ownership, "may successfully maintain production," that the fact that they "have laid out large sums of money in supplying themselves with private cars," and that the Commis-

sion's orders would deprive them "of the use of such cars in time of car shortage," constitute a justification of the undue prejudice to other shippers which the Commission finds results from these very facts. That is to say, the Court seems to hold that the *profit* to these private car owners resulting from the different and better service which they receive, as compared to that received by other shippers, justifies that different and better service. The Commission holds this different and better service to be unduly preferential of these private car owners and unduly prejudicial and discriminatory against other shippers, and bases that finding upon the results, as shown by the evidence.

Upon the whole, it is believed to be fair to say that the judgment of the lower Court is based upon the conclusion that the orders of the Commission, which it sets aside and declares null and void, might or would operate to increase the cost of railroad fuel, and might or would deprive the owners of private cars of the different and better transportation they admittedly now receive as compared with the transportation service received by other shippers, and that these considerations are of determinative weight, for the reasons given in the opinion. These reasons and judgment are believed to be unsound.

THE ARGUMENT

The question in issue in all these cases is whether or not the trial Court was justified in enjoining the enforcement of the orders of the Interstate Com-

merce Commission, under attack herein, at the instance of the appellees. The broad, almost plenary, powers of the Commission to regulate the distribution of cars by railroads, and the strict limitations upon the authority of the Courts to enjoin the Commission's orders entered in the performance of its duties in that respect, are the controlling factors in the consideration of these appeals. The orders of the Commission in question are fully set out in the briefs of counsel for the United States and for the Commission, to which reference is made.

The Commission found, as a fact, that the existing car distribution rules, when applied to privately owned coal cars, operate to create undue discrimination and prejudice against shippers of coal who do not own coal cars to be used in the shipment of their coal; and that said rules, as applied to coal cars assigned to mines by the railroads for the purpose of supplying their needs for fuel coal and not counted, in the general distribution of coal cars, against the mines to which they are assigned, likewise operate to create undue discrimination and prejudice against shippers of coal from other mines. To meet this situation and to remove said undue prejudice and discrimination thus found to exist, the Commission, in the exercise of the authority vested in it by law, modified said rules governing the distribution of coal cars to the extent and in the manner set forth in its said orders of June 13, 1923, and December 23, 1924.

THE SCOPE OF THE COMMISSION'S ORDERS

The Commission is a fact-finding body composed of men experienced in transportation matters. The law contemplates and assumes that the Commission shall be better qualified to make findings of fact on such questions than are the Courts. The Commission is, in fact, a jury of experts. This Court has always recognized this policy and intent of the law, the peculiar fitness of the Commission to make such findings and that its jurisdiction in the matter of fact-finding is exclusive. Therefore, this Court will not consider the mere weight of evidence in testing the validity of an order of the Commission, and will not set aside such an order except where it finds that there is such a lack of evidence to support it as to make the order arbitrary.

The evidence supporting the finding of fact by the Commission that the existing car distribution rules work undue preference and undue prejudice, as set out in its opinion, pervades the whole record. Such discrimination was specifically shown to exist, among others, on three railroads, the Pennsylvania (R. 1491, 1605-1606), the Louisville and Nashville (R. 1501-1505, 1608-1613), and the Chesapeake and Ohio (R. 940, 1625), but it has been contended that this showing does not justify an order of such wide scope as that entered by the Commission. It must be remembered that these

three railroads are three of the greatest coal-carrying roads in the country, and that they are typical of all coal-carrying railroads.

It must also be remembered that the task confronting the Commission was to lay down a proper *rule for coal car distribution in the future,* and not to redress any wrongs resulting from the old rule. A rule is preventive and regulative, not remedial, in its nature. The Commission was justified in taking the evidence as to the result of the operation of the existing rules on the three railroads mentioned as establishing the necessity for changing those rules, even if there had been no other evidence. It was entirely warranted in finding that the effect of those rules would be the same on other roads, and in promulgating rules that would, in its judgment, prevent the recurrence of such evils.

Additional specific evidence upon which the Commission's order was based and which supports that order, is pointed out in the briefs filed on behalf of the United States and of the Interstate Commerce Commission, to which reference is here made.

Without burdening the Court by again citing the pertinent cases cited and distinguished by counsel for the United States and counsel for the Interstate Commerce Commission in their briefs, we submit, for the consideration of the Court, in the light of those cases, our views upon certain positions taken and contentions made on behalf of the appellees.

THE TRAER-HOCKING VALLEY RULE

It has been asserted by counsel for appellees that the adoption of the Traer-Hocking Valley Rule *"recognized the right* of the private car owner (1) to the exclusive use of his own cars, and (2) to the full enjoyment thereof to the extent that such cars were actually available for loading and movement."

It is added, however, that this rule is established in order to bring about a reasonable and non-discriminatory car distribution.

The two statements are not consistent. To "recognize a right" is one thing, and to establish a rule to accomplish a given end is another thing.

The creation of the Interstate Commerce Commission to remove discriminations of all kinds theretofore existing, was the beginning of a new era in railroad transportation. That act made illegal a vast body of practices and customs theretofore obtaining, and the Commission was confronted with a task of immense magnitude. Naturally it had to move slowly. It could not, as a practical matter, cut up by the roots at one stroke all these former practices, even if it had been able to determine at once (which it was not) in full detail just what practices were, and what were not, made illegal by the act. Necessarily, as stated by it in many opinions, progress was slow.

It was not until 1907 that the Commission reached the conclusion that the then existing rules

of car distribution were, in fact, discriminatory; and in the Traer-Hocking Valley cases it took the first step towards a non-discriminatory rule of coal car distribution.

It cannot fairly be said that those decisions and the rule there laid down "recognized" any "right" of private car owners. That rule, as applied to privately owned coal car distribution, is "permissive" only in its nature, and embodied nothing more than the judgment of the Commission, under conditions then shown to exist, as to what changes in the rules of coal car distribution should be made. The Commission was not thereby precluded from a reconsideration of the matter, even under the same conditions, and certainly not under changed conditions. The Commission is charged with the continuing duty of maintaining non-discriminatory rules, and the plea of *res adjudicata* is not admissible in such cases.

By its said orders of June 13, 1923, and December 23, 1924, under attack in these cases, the Commission modified the rule laid down by it in 1907, the Traer-Hocking Valley Rule, just as it had by that rule modified the rules previously existing; and upon the same ground, namely, to remove the discrimination and prejudice which it found, under changed conditions, as a matter of fact, to exist under that rule. Its action is challenged, and its legal power to make this modification is denied, both as a matter of law and under the evidence before it.

It may here be observed that whatever the

"right" of the private car owner may have been originally as to the placement and movement of his cars, that right was subordinate to the right of Congress to regulate Interstate Commerce. All privately owned coal cars have been acquired with that knowledge. Congress has declared that railroads engaged in Interstate Commerce shall not engage in any discriminatory practices, including discrimination in car distribution. The Act to Regulate Interstate Commerce created the Interstate Commerce Commission to carry its provisions into effect. As heretofore stated, it is first of all a fact-finding body, charged with the duty of determining, as a matter of fact, whether or not any given practice violates any provision of the Act and, in case it does, to prohibit the continuance of such practice. All supposed or alleged *rights* of coal car owners and users are subject to the power of Congress and are here limited and determined by these provisions of the Act. These owners have no "vested" rights in the distribution and use of their cars after they have placed these cars on the tracks of carriers of interstate commerce, for use, and so under the jurisdiction of the Interstate Commerce Commission.

A practice or rule, non-discriminatory and lawful under given conditions, may become discriminatory and unlawful under changed conditions. The power of the Commission to re-examine its acts and change its rulings, either to conform to a more mature consideration of existing facts or to changed conditions, cannot be denied.

APPELLEES' CONSTRUCTION OF PARAGRAPH 12, SECTION 1, OF THE ACT

The construction to be placed upon Paragraph 12, Section 1, of the Interstate Commerce Act, is the principal, perhaps the determining, legal question involved in this case. Counsel for the private car owners in the trial court, based their argument largely upon the difference in language between the provision governing car distribution as passed by the Senate and Paragraph 12, Section 1, of the Act as finally adopted.

The Senate adopted the following:

> "That no cars shall be furnished to or used by any mine for the transportation of coal during a car shortage period in excess of the proportionate distributive share of such mine, regardless, in either case, of who the consignor or consignors, or the consignee or consignees, or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or of the ownership of such car or cars."

Paragraph 12, Section 1, of the Act as passed is as follows:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily de-

pendent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines, it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine."

The contention is made by the appellees that since both of the provisions quoted were before Congress and it adopted the latter, it in fact enacted the Traer-Hocking Valley rule into a statute, which the Commission has no power to change.

This contention is, it is respectfully submitted, wholly untenable, for several reasons:

First: The two paragraphs quoted are not comparable, because they do not belong to the same class. The Senate originally adopted a *rule for the distribution of cars,* while Paragraph 12, Section 1, finally adopted by Congress, simply imposes certain definite duties upon the railroads, and belongs to the same category as other sections of the Act imposing duties upon railroads. The one was a regulation, invading the field of administrative power conferred upon the Commission by the Act; the other prescribed and defined particular duties of the railroads which the Commission, as in all other cases of railroad duty, must see are properly performed.

Second: Paragraph Twelve does not purport to enact the Traer-Hocking Valley rule, or any other

rule; but, on the contrary, the language negatives any such intention.

Third: By refusing to adopt the Senate's action, Congress declined to assume any of the duties imposed upon the Commission by the Act as a whole. It refused to enact into law *any rule* of car distribution.

Fourth: By adopting Paragraph Twelve, Congress affirmatively declared that it would confine itself to defining and prescribing the duties of the railroads, and leave the enforcement of those duties to the Commission. The Legislative history of Paragraph Twelve shows nothing more or less than care on the part of Congress to be certain that its action would not conflict with the statutory authority of the Commission.

Fifth: Paragraph Twelve, as here construed, is in harmony with the general tenor and plan of the Act, but to construe it as a *rule of car distribution* would be to take out the general jurisdiction of the Commission a small section of railroad activities, without any apparent reason, and harmfully hamper the Commission in its general duties.

Sixth: Whether or not any practice of railroad companies is discriminatory is always a question of fact, and the construction of Paragraph Twelve made by counsel for the private owners of coal cars would take away from the Commission, the fact-findng body created by the Act, the power to determine questions of fact, that is, the existence or non-existence of discrimination, so there would be left nobody to pass upon that question.

Seventh: The construction placed upon Paragraph Twelve contradicts the plain intent of other Sections of the Act, as well as of Paragraph Twelve. Paragraphs 11, 12, 13 and 14, of Section 1, must be read together. Paragraphs 11 and 12 are confined to a statement of the duties of the railroads, while paragraphs 13 and 14 are concerned with the power of the Commission. Paragraph 11 begins with the words "It shall be the duty of," and requires railroads (a) "to furnish safe and adequate car service" (in fact), and (b) "to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service." Paragraph 12 begins with the words "it shall *also* be the duty of," and requires the railroads (a) "to make just and reasonable distribution of cars for the transportation of coal" (in fact), under car shortage conditions, "to maintain and apply just and reasonable ratings of such mines" (in fact) and (c) "to count *each and every* car furnished to *or used* by any such mine for transportation of coal against the mine" (in fact). Why make "just and reasonable distribution of cars?" Obviously, to avoid discrimination. Why "maintain and apply just and reasonable ratings of such mines"? Clearly, again to avoid discrimination, by showing the relative number of cars to which each mine is entitled. Why "count *each and every* (no exception of private cars) car furnished to or *used* by any such mine for transportation of coal against the mine"? Certainly, to avoid discrimination, by insuring that no mine *received* other than its proportionate share of cars as determined by its rating.

The word "used" is significant, as it excludes all idea of ownership of cars as affecting car distribution and affirmatively places them under the jurisdiction of the Commission for that purpose. Some power must exist to see that these *unqualified duties* are performed, and this power is vested in the Interstate Commerce Commission, but the private car owners contend that these requirements for the performance of definite duties are not such at all, but that they constitute an inflexible rule, automatic in its operation.

Further, after the railroad "duty paragraphs," 11 and 12, comes Paragraph 13, giving authority to the Commission to require the railroads "to file with it ** their rules and regulations with respect to car service," it being thus the regulating power which must approve all such rules and regulations. It alone determines whether or not the railroad "rules and regulations" bring about "just and reasonable distribution of cars for the transportation of coal." A statutory rule, such as appellees contend for, would negative any such power in the Commission and would nullify Paragraph 13.

Finally, Paragraph 14 follows, giving to the Commission the broad and unqualified power, on complaint or "upon its own initiative," to "establish reasonable rules, regulations and practice with respect to car service by carriers by railroad subject to this Act." There is no hint of a hidden exception to that power being concealed in Paragraph 12.

The inevitable conclusion is that certain specific duties are imposed upon the railroads, and they are

required to "establish, observe and enforce just and reasonable rules, regulations and practices," in order that these duties may be performed, and then the Commission is given plenary power to pass upon what they have done in both respects.

To illustrate: Taking Paragraph 12, standing alone, and, without the decisive provisions of Paragraphs 13 and 14, assume that a railroad Company has fully lived up to the requirement of properly "rating" the mines on its line, and has counted "each and every car against the mine." "Rating" mines and "counting" cars, standing alone, mean nothing. The further requirement of Paragraph 12 remains, namely, that the railroad shall "make just and reasonable distribution of cars for transportation of coal among the coal mines served by it." This paragraph does not say what is a "just and reasonable distribution of cars," but suppose we assume that the Traer-Hocking Valley rule was in effect, and the railroad company distributed its cars in accordance with that rule. We would then have a situation in which the Commission, not the statute, had laid down a definite rule to govern the action of the railroad. It must be assumed, however, that the Commission arrived at the decision to establish that rule after due investigation. If that be true, certainly the Commission has the power, after observing the operation of that rule, to change it, if it finds that in practice it works discrimination, that is, fails to accomplish the purpose for which it was made. Certainly, also the Commission has the power to change that rule to conform to changed conditions.

In other words, its power to establish and enforce such rules is a continuing power, to be exercised always in the light of experience and existing conditions. The owners of private cars, however, maintain that, having once established a rule, the Commission is without the power to change it. This contention nullifies the whole intent and purpose of the Act to regulate Interstate Commerce.

WITH PARTICULAR REFERENCE TO CONTENTION OF THE RAILROADS.

Railroad companies are public service corporations, charged with the legal and public duty of furnishing adequate transportation facilities for all shippers, which must be done at their own expense and for which they are compensated by freight rates fixed or approved by the Interstate Commerce Commission. They allege in their bill of complaint herein that it is to prevent their failure to perform this statutory duty that they claim the right to assign cars for their own fuel purposes at all times, and they base that claim of right upon the assertion that it is necessary in order to perform this duty to the public. The allegation of necessity is not true in fact, as will hereafter appear. It is also respectfully submitted that this argument is not valid, and that this claim of right is contrary to law, for the reason that such an assignment of coal cars results in undue preference to the mines to which coal cars are so assigned and in undue prejudice and discrimination against other mines in that it inflicts upon the owners

of such other mines a direct money loss, as herein shown, for which there is no compensation.

This is a taking of their property and property rights without compensation. It is not within the power of the Government itself to take private property or property rights for public service without compensation, and it necessarily follows that no such power can exist in railroad companies.

When a railroad company, in times of car shortage, arbitrarily takes from the total coal car supply a sufficient number of cars to supply its fuel needs, that number being in excess of the *pro rata* share of the total car supply to which the mine or mines to which they are sent are entitled, it does so by reducing the *pro rata* share of cars which other mines receive. This discriminatory and prejudicial taking away from the other mines of a part of their *pro rata* shares of cars inflicts direct injury and loss upon them in the following, among other, particulars: (a) the production of the mines is reduced, thereby increasing the cost of production; (b) the production being decreased, there is a loss of business and a consequent loss of profit, and of good-will resulting from the enforced inability, on account of lack of cars, to fulfill contracts; (c) the labor conditions of these other mines are directly and injuriously affected by the better and fuller employment of labor at the so-called fuel mines, resulting in taking away from the said other mines the more efficient laborers, and creating discontent among those remaining; and (d) the assignment of cars for railroad fuel, giving to the mines furnishing it full running time, is used

by the railroad companies to beat down the prices of coal which they would otherwise pay or at least has that effect and such purchases of so large a percentage of the total output of coal (28 to 33 per cent.) at reduced prices, depresses the whole market and causes a loss to all other operators. For these losses so imposed and incurred, the mines suffering the same receive no compensation and can obtain none.

In answer to the contentions of railroads that if they cannot so assign cars for their fuel purposes the public will suffer, we say: (1) That this allegation is untrue in fact, and that there is, always has been, and always will be, an ample supply of suitable coal, easily obtainable on the open market by the railroads to supply all their fuel needs, and they can always purchase it as other users of coal purchase their coal, and the fact, if it be a fact, that fuel so purchased would cost the railroads more than if procured by giving preferential use of cars to mines furnishing them fuel, does not justify such preferential use of cars which is erroneously alleged to be necessary. (2) That if it be admitted that if the railroads are not permitted to assign cars for fuel purposes as claimed by them, the public would suffer, then it is the whole public, and not upon individuals or individual companies, parts of that public, that the said suffering or loss *should* fall; that is to say, the plaintiffs herein and other railroad companies should not be permitted to enable themselves to perform their statutory duties by infringement upon private rights and by taking private

property, and any loss of suffering resulting from their failure to perform their statutory duties ought to fall upon the public as a whole in the form of reduced service. If that failure is due to the negligence of the carriers themselves, they have no right to make private individuals or companies suffer or pay therefor in the form of losses resulting therefrom. If that failure is due to unusual conditions, as is generally the case, and not to the carriers' failure to furnish cars sufficient for normal demands, they owe no further duty to the public, and cannot take private property or property rights to enable them to render a service they are under no legal obligation to render. So, in any event, the public as a whole should accept the result of a car shortage or a failure of transportation in any form, in reduced service, instead of such loss being imposed upon individuals for the benefit of the public, and without compensation to such individuals.

WITH PARTICULAR REFERENCE TO CONTENTIONS OF THE PRIVATE OWNERS OF COAL CARS.

Privately owned cars, in the use of railroad companies, are governed by all the laws regulating Interstate Commerce, and are under the authority and control of the Interstate Commerce Commission. The Statutes so provide.

This fact has long been recognized by the Interstate Commerce Commission to the extent of exercising control over the operations of privately

owned cars, and to the extent of requiring that they be counted as part of the total supply of cars, and the statute gives the Commission the power to fix the compensation to be paid by the carriers for their use.

In the orders of the Commission under investigation in these cases, the Commission has declared that the mines served by the privately owned cars shall not receive from time to time more cars than their *pro rata* shares when compared with other mines, holding that any other practice is unduly discriminatory and preferential. It is respectfully submitted that the Commission *might,* in the exercise of its statutory discretion, have further held that in fact all coal cars for the use of which the railroad company pays must be counted, treated and used in all respects as system cars, but it did not deem it necessary, apparently, to go that far at this time. It did not require privately owned cars to become subject to public use.

Appellants further say the facts in this case are, as shown by the evidence introduced before the Commission by the owners of said private cars, and not denied anywhere, that the railroad companies do not pay for the use of the privately owned cars in evidence before the Commission an adequate compensation, but that they pay amounts barely sufficient to keep up repairs on the cars. These amounts do not provide for depreciation or for return on invested capital, and, therefore, the owners of said private cars in fact pay a bonus to the

railroad companies in the form of furnishing invested capital free of charge, for which they receive in return the privilege of using the railroad companies' motive power, road and terminal facilities, and administrative services, to a greater extent than they can be used by others. While they nominally pay the same freight rates on their coal as are paid by others, they in fact pay a higher rate, for which they receive a different and better service, and therefore, the owners of private cars operate under special contracts with the railroad companies, from the benefits of which the general public is excluded because of lack of money or unwillingness to furnish the equipment necessary to give them such special and better service.

The private car owners, appellees in these cases, when all is said and done, really base their contentions upon the magnitude and importance of their business, and the great advantages which they obtain through the use of private cars over the service which they would receive without their private cars. Lunsford (R. 1380), testifies that the better service which his company, Fordson Coal Company, received after purchasing private cars reduced the cost of production of coal from $4.12 per ton to $1.93 per ton.

No comment would seem to be necessary upon this evidence, since it is self-evident that the railroad companies serving the coal mines of the Fordson Coal Company and transporting coal to the plants of the Ford Motor Company rendered to

them a service vitally different from and better than the service they rendered the owners of other coal mines. Of course it is good business for the private car owners to get their coal as cheaply and as regularly as possible. So is it good business for the manufacturer of wheelbarrows or the owner of a dry kiln or a lime kiln to get his coal cheaply and regularly. The profits reduced or the loss sustained by the non-use of private cars is as vital to the little man as to the big man, the only difference being in amount.

This "dollar argument" runs through the whole of these proceedings before the Interstate Commerce Commission, and evidence of this same character was introduced by all of the owners of private cars. That is the very reason given by them for the purchase and use of private cars, namely, that the owners may receive greater and better service than they could otherwise receive. For instance, Mr. E. J. Berwind (R. 1282) explains that he desires and must have, just as do the original plaintiffs in the other cases, a service different from and better than that rendered to ordinary shippers, which service he can obtain only through the ownership and exclusive use of coal cars, and so it is necessary to own cars and to have the exclusive use of them. They all simply mean that they make more money by using their own cars than they otherwise would.

It must always be borne in mind that what a railroad company sells is service. Cars are simply one

of the instruments of service, and when a railroad company gives to one shipper more and better service than it gives to another, it is doing something which the Act to Regulate Commerce was intended to prevent.

These private car owners not only demand and obtain such preferential service, but, as hereinbefore stated, they do it through the means of a direct monetary advantage, to say nothing of the operating advantage, to the railroad companies. The witness, H. B. Rust, admits that the users of private cars have an advantage over other people, and that his Company (Record, pages 664-5), indirectly paid the railroads $800,000, being a saving to the railroads of that charge, by the use of private cars. He itemizes this $800,000 (Record, pages 729-30), as being composed of expenses and repairs, expenses being looking after the cars, $143,000; depreciation, $532,000; and the balance of the $800,000 being interest on the $3,000,000 invested in the cars, which is less than 2% per annum, and that the privilege was worth $800,000 to his Company. In other words, the railroad companies profited to the extent of $800,000 by the use of these private cars, as against what their situation would have been had they furnished the cars themselves. The evidence of E. J. Berwind is to the same effect (R. 1278). This amounts to a positive and, it is reasonable to say, irresistible inducement to the railroads to give to privately owned cars preferential movement at all times. That they have done

so appears from the Commission's finding upon the evidence. It has been argued by counsel representing the private car owners that this has been done only under abnormal conditions and that a general rule should not be based upon abnormal conditions. They overlook the fact that the rule actually comes into play only during abnormal times and under abnormal conditions, the very time when preferential movement is given.

The unsoundness of the contention of the private car owners is further found in the fact that they seek to confine the question to the railroad upon whose line their mines are located, and say that when that railroad has sufficient motive power and other transportation facilities to handle their cars, it should be permitted to do so, notwithstanding the fact that other shippers not owners of private cars will not receive the same car allotment.

For the purposes of this case the railroads of the country should be considered as a whole. Any car shortage anywhere is due to some fault in transportation at some place. That car shortage affects the transportation system of the country as a whole, and that burden should not be imposed alone upon those dependent upon system cars. In other words, all shippers, owners of private cars as well as users of system cars, should bear their proportionate part of the general transportation weakness, whatever or wherever it may be.

If the theory of the private car owners is adopted, and transportation service may be obtained and made certain solely by those who have money enough to

purchase private cars, then the basis of common carrier service has been changed from the theory that all shippers shall receive equal service to the theory that they shall receive service in proportion to the money they have with which to purchase private cars. This is not the kind of "fortune" which the Commission has declined to equalize. If car distribution is placed upon that basis, then the functions of the Interstate Commerce Commission had as well cease and the railroads go out of the service of the public and into the service of those who are able and willing to pay the most for it.

THE LAW APPLICABLE TO THE CASE.

All the law pertinent to this case is laid down by the Supreme Court of the United States in the case of Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S., 452, no case since then having changed the principles there enunciated. All of these cases have been carefully and critically considered by counsel for the United States and counsel for the Interstate Commerce Commission, and reference is here made to them solely for the purpose of calling the attention of the Court to the fact that the construction of Paragraph 12, herein set forth, is in nowise in conflict with any of these cases. The case of the Virginian Railway Company vs. United States, decided by this Court on the 13th day of December, 1926, (71 Law Ed. Advance Sheets No. 5, 257), again reaffirms the Illinois Central case just cited.

It is believed that there can be no doubt of the fact that the intent of the Act to Regulate Commerce is to see to it that there shall be no favoritism shown to any shipper, and no discrimination made against any shipper. All of the provisions of the Act, those prescribing the duties of the railroad companies, and those conferring the broad powers upon the Interstate Commerce Commission must be read and construed with that intent in mind. For example: Paragraph 12 above cited makes the mine the unit for the division of service. Each mine is rated, and each mine is entitled to its *pro rata* share of the service which the carrier is able to perform, thus showing clearly the intent running through the whole Act that no mine shall be given preferential service, and that there shall be no discrimination against any mine.

THE TRANSPORTATION ACT.

Both the railroads and private owners of coal cars apparently fail to give proper weight to the amendments to the Act to Regulate Interstate Commerce made by the Transportation Act. Section 400 of the latter Act, amending Section 1 of the Commerce Act, contains the following:

> 3*** "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and *all* instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof,* and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing,

storage, and handling of property transported." 41 Stat., 474-5.

4. "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor***." 41 Stat. 475.

Paragraphs 11, 12, 13 and 14 of this Section have already been cited. Paragraph 3 of Section 400 brings *all* cars, "irrespective of ownership or of any contract, express or implied, for the use thereof," under the provisions of the Act and, consequently, under the control of the Commission. This includes privately owned coal cars. Not only is no exception or qualification of the Commission's authority made as to them, but they are expressly included, "irrespective of ownership or of any contract, express or implied, *for the use thereof.*" In other words, their "use" is in nowise different from the "use" of any other cars. Paragraph 12 has been shown to include them, so that it is confidently submitted that "ownership" of cars and "contracts" as to their use are wholly immaterial so far as the authority of the Commission to direct their distribution is concerned. The validity of the statute is not questioned. There is, therefore, no ground for the contention made by the private owners of coal cars that their rights have been affected by the orders of the Commission. The statute disregards, as wholly immaterial, the legal title to the car itself. That title is unaffected, but the *use of the car* is regulated and it is made plain that

holding the legal title thereto gives no special privilege as to its use. This is no "taking of private property."

CONCLUSION.

The Interstate Commerce Commission, through a long period of years, has carefully studied the question of car distribution as one of the elements vital in all questions of discrimination. It has made several investigations and has slowly developed its conclusions. It has carefully watched the operation of each set of car distribution rules. It established the Traer-Hocking Valley rule as being its best judgment at that time upon this vital question. The Courts approved that rule, and they could not have done otherwise, for the reason that it was strictly within the jurisdiction of the Commission, based upon an investigation, and there was nothing to show it was not justified by the evidence.

Since that time the Commission has watched the operation of that rule and has made further investigations. It has now reached the conclusion that, as conditions now are, with the great increase in the number of private coal cars in use, that rule can no longer be said to be the just and reasonable rule required by the statute. The Commission has found as a fact, based upon experience and upon the evidence in this case, (pages 558-9, 561, 735 and 736 of its opinion), that the Traer-Hocking Valley rule does not, in deed and in truth, remove undue prefer-

ence and discrimination. The Commission says in its opinion that it has reached this conclusion after long study and close observation, and that it has deliberately, after several years of trial, under very trying circumstances, reached the conclusion that this rule does work undue preference in favor of the owners of privately owned coal cars, and undue prejudice against the owners of mines not so favored.

This is the deliberate and solemn finding of fact made by the special tribunal created by the Congress of the United States for the express purpose of passing upon that very question. Its finding is clearly within the provisions of the law herein quoted, upon the very questions contemplated by that law; is within the strictly defined power of the Commission; is based not only upon evidence, but upon "informed experience." The law gives to this experience of the Commissioners very great weight, and this Court recognizes its value. *Virginian Railway vs. United States, supra.* This finding of the fact that the Traer-Hocking Valley rule does work discrimination and undue preference is not only entitled to more weight than the verdict of a jury, but is in fact conclusive upon the Court, because, as this Court has so frequently held, the only instance in which the Court can disregard and set aside such a finding is the case where it is without evidence to support it, and is wholly arbitrary. No such contention can reasonably be made in this case.

For these reasons, it is respectfully submitted that the trial Court erred and that its judgment should be reversed.

Respectfully submitted,

GREEVER AND GILLESPIE,

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IN THE

Supreme Court of the United States.

October Term, 1926.

No. 606.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants.

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY, ET AL.

BRIEF FOR RAILROADS.

I. STATEMENT OF THE CASE.

The injunction of the District Court.

The Bill of Complaint of the railroads (which include the principal bituminous coal carriers of the country) sought to enjoin an order of the Commission relating to the distribution of cars for bituminous coal loading in times when a full supply of cars is not available at the mines. The Commission on its own motion had instituted an investigation on March 22, 1921, into the coal car distribution rules of the railroads of the

United States as applied to private cars and cars for railroad fuel coal. The order of the Commission dated June 13, 1923, affirmed on rehearing December 23, 1924, required the railroads to establish on or before March 1, 1925, and thereafter maintain a proportional distribution of coal cars without regard to assignment. All cars, whether private cars or cars for railroad fuel are covered by the order. The reports of the Commission in support of its order (80 I. C. C. 520 and 93 I. C. C. 701) contain findings of fact and discussions of law and are made part of the Railroad Bill as Exhibits A and B. Dissenting opinions were filed by four Commissioners. The District Court enjoined the order on the ground that it is not sustainable as matter of law on its face and is beyond the Commission's powers.

The assignment of railroad fuel cars and private coal cars is matter of administrative, judicial and legislative history. In its original report the Commission recites this history, commencing with the assignment practice prior to 1907. Before considering this historical matter, certain peculiarities of the business of mining and transporting bituminous coal may be mentioned.

Coal flows from mine to car.

Bituminous coal is ordinarily run direct from the mine tipple into the railroad car; therefore the operation of mines is affected when enough coal cars to meet all demands are not immediately avail-

able at the mines. Moreover, the demand for coal cars is uneven, as the Commission finds (page 535)*:—

Seasonal demands.

> "The demands for coal are seasonal, and as a result we have frequent seasonal or local car shortages. In 1916, when we began to feel the effect of the war in Europe, we experienced widespread car shortages, resulting in an investigation by us on our own motion, *Car Supply Investigation,* 42 I. C. C. 657."

Overdevelopment of coal mining.

Another factor of importance was caused by the War—over-development of the coal mining industry. In connection with its finding of uneven demand, the Commission says (page 535):—

> "There are more mines than is consistent with the most efficient use of equipment, and their aggregate capacity exceeds greatly the country's demand."

Effect of over-development.

Over-development and its effect are described (page 547):—

> "All interests represented take the position that the bituminous coal-mining industry is greatly over-developed, and that there is a surplus of labor available for such mines. In times of plentiful car supply, or when the demand for bituminous coal is low, many

*Page references without more herein are to official pagings of Commission's two reports in this case, 80 I. C. C., pages 520 to 589, and 93 I. C. C., pages 701 to 754. When quotations are from dissenting opinions, that fact is mentioned.

small or weak mines, which are the least economical to operate, are forced to close. Car shortages are usually accompanied by a condition of alarm on the part of the consuming public, and a demand for the coal which becomes more excited as the coal-car supply lessens. This encourages the opening of the smaller and weaker mines with the recurrence of a poor car supply, and the paradox is presented that as the car supply becomes worse the capacity of the open mines increases at even a greater rate."

Again, the Commission observes (page 543):—

Inflation of ratings.

"that the orders by mines in times of shortage, * * * which approximate the mine ratings, are notoriously far greater than the normal mine capacities, or the ability of the carrier to transport, or the country to consume bituminous coal, when taken in the aggregate."

The schemes for ascertaining mine capacities have been inquired into by the Commission and are the subject of its separate report in the Mine Rating Case, 95 I. C. C. 309 (1924). The subject of Mine Rating is not in issue here. So far as equality of distribution is concerned, the ratings of a mine are of no importance provided all mines are rated on the same basis, but the matter becomes of importance if adequacy of car supply is tested by aggregated ratings.

The Court will also note that *distribution* of the available supply of cars—not adequacy of car supply—is in issue here. The railroads are under statutory duty to furnish "adequate car service" (paragraph (11) of Section 1 of the Act), and the Commission is empowered to enforce that duty. The majority observes that in another case the *adequacy* of car supply is under investigation (page 737). For the purposes of the present case, the adequacy of the supply is assumed by the Commission. The railroads have always undertaken to make proportionate allotment of the available supply of coal cars among bituminous coal mines. In the allotment the prior necessities of the railroads for fuel and the rights of owners of private cars have been observed and upon these factors have been based the following classifications of coal cars (for description of these classes see the recitals of the opinion of this Court in Interstate Commerce Commission *vs.* Illinois Central R. R. Co., 215 U. S. 452, 1910): (1) system cars,—cars available for use without restriction and used for carriage of coal consigned in commerce; (2) home line fuel cars,—cars necessary for and used in the receipt of railroad fuel from mines on the line of the railroad owning the cars; (3) foreign line fuel cars,—cars owned by other railroads than the railroad originating the coal and delivered to the railroad upon whose line the mine is situated,

Adequacy of car supply not here in issue.

History of coal car distribution —proportionate distribution.

Classifications of cars.

for the sole purpose of receiving fuel coal for the foreign line, and being returned to the foreign line; (4) private cars,—cars owned by others than railroads, as coal mining companies, shippers or consumers and public utilities, and consigned to and moving from mines to destination under the orders of their owners. The last three-mentioned classes of cars are the cars which the Commission describes as assigned cars.

Assignment for railroad fuel—Early practices.

Before 1907 the railroads commonly delivered to coal mines on their lines private cars, foreign railway fuel cars and home line fuel cars, according as the cars were consigned by their owners or assigned for receipt of railroad fuel. At times when sufficient cars were not available to meet all demands, such cars were placed at mines in addition to their full allotment of system cars available for general commercial distribution. "Thus," as the Commission puts the matter in its first report in the present case (80 I. C. C. 525) "the cars assigned were not counted against the mine, as the phrase commonly ran." The practice was the subject of complaints passed upon by the Commission in Railroad Commission of Ohio *vs.* Hocking Valley Ry. Co., 12 I. C. C. 398; and Traer *vs.* Chicago and Alton Railroad Co., 13 I. C. C. 451. The Hocking Valley case dealt with foreign railway fuel cars and private cars and the Traer case dealt with home line fuel cars. These cases came

Hocking Valley and Traer cases.

before the Commission as a result of a nation-wide and prolonged car shortage period: see Car Shortage—Insufficient Transportation Facilities, 12 I. C. C. 561 (1907).

Rule of Assignment formulated by Commission.

In its first report on the present case (page 526) the Commission states the effect of the Hocking Valley and Traer decisions:—

> "We held in effect that the private cars and foreign railway-fuel cars as described should be given to the mines to which they were consigned or assigned, but must be counted against the distributive share of the mines. If such specially consigned or assigned cars equaled or exceeded the distributive share of a mine receiving them, the mine should have no additional cars, but if not equal to the distributive share, it should be given only sufficient additional cars to make up its distributive share."

Requirement of count of assigned cars.

In sanctioning the placement of railroad fuel cars and private cars at the mines to which they are assigned or consigned, the Commission recognized that the railroads could not perform their duty as common carriers unless they were assured of a dependable supply of suitable fuel at reasonable prices, and that the private car owners had the right to the use of their property.

Hocking Valley-Traer Rule adhered to by Commission.

The Rule of the Commission became known as the Hocking Valley-Traer Rule. It was re-

iterated in several other Commission decisions (Royal Coal and Coke Co. *vs.* Southern Railway Co., 13 I. C. C. 440; Rail and River Coal Co. *vs.* B. & O. R. R. Co., 14 I. C. C. 86; and Hillsdale Coal and Coke Co. *vs.* Pennsylvania R. R. Co., 19 I. C. C. 356) and was adhered to by the Commission and practiced by the railroads down to the commencement of Federal control in 1918.

and sustained by Supreme Court.

The power of the Commission to announce and enforce the Hocking Valley-Traer Rule was attacked in the courts. This Court sustained the power of the Commission: Interstate Commerce Commission *vs.* I. C. R. R. Co., 215 U. S. 452.

Statement of the Rule.

The Assigned Car Rule or Hocking Valley-Traer Rule, thus definitely established and "in a state of repose until the advent of Federal control," as the Commission here finds (page 527), is as follows (page 524):—

> "(8) Private cars, such cars as are assigned to mines for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in R. R. Commission of Ohio, *et al. vs.* H. V. Ry. Co., 12 I. C. C. 398, and Traer *vs.* Chicago & Alton Railroad Co. *et al.*, 13 I. C. C. 451, * * * will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.
>
> (9) If the number of assigned cars placed at a mine during any period, as provided in

rule 8, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines based on a revised percentage by reason of such elimination.

(10) If the number of assigned cars placed at a mine during any period, as provided in rule 8, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

It is necessary to remark in passing that nothing in the Record justifies the suggestion repeated throughout the Commission's Brief (pages 6, 14, 20, 21, 62, 108 and 109) that originally the rule was designed and operated to bring about *pro rata* distribution, but that the design and result were later circumvented by concentrating assigned cars at a few mines. In the rule itself and all the discussions of it in the Commission's reports "there was attached to the counting requirement a qualification that all assigned cars shall nevertheless be delivered to the mines to which assigned or consigned," etc. (page 530). The same thing was recognized by this Court in the Illinois Central case: 215 U. S. 452, at page 465.

Power of assignment preserved in Federal Control.

During Federal control, about July 1, 1918, authority for assignment of cars for railroad fuel, home and foreign, was lodged in the Car Service Section of the Railroad Administration; no change was made with respect to private cars. Effective October 10, 1918, the Railroad Administration promulgated rules for mine rating and car distribution, known as Circular C. S. 31. These rules, with some unsubstantial revision (see Circular C. S. 31 Revised, page 527), remained in effect until the termination of Federal control. No change was made in the counting requirements of the Hocking Valley-Traer Rule. Further to protect railroad fuel necessities, the Railroad Administration took the position that if a coal mine operator had a contract for railroad fuel he would have to load on that contract preferentially (page 528).

Priority of delivery of railroad fuel.

Transportation Act, 1920.

Termination of Federal control of railroads was accomplished by the Transportation Act of 1920. That Act also made extensive amendment of the Act to Regulate Commerce. In particular, the car service paragraphs—Section 1 of the Act to Regulate Commerce—were revised and amplified. These car service paragraphs had originally been brought into Section 1 by the Car Service Amendment of May 29, 1917: 40 Stat. at Large, 101. Of particular interest is paragraph (12) added by the Transportation Act, prescribing

Car Service Paragraphs.

duty in time of car shortage to maintain mine ratings "and to count each and every car furnished to or used by any such mine for transportation of coal against the mine." In the passage of the Transportation Act through the Congress a determined effort had been made to include in the car service paragraphs an express prohibition of the Assigned Car Rule. The history of that effort and the text of the proposal and the rejection of it by the Congress must be dealt with in more detail under the first head of Argument in this brief.

Assignment after Federal Control.

When the railroads were turned back by the Government to their owners on March 1, 1920, by force of the Transportation Act, assignment of railroad fuel cars under the Hocking Valley-Traer Rule was not immediately practiced again—it had never been suspended as to private cars. True, the Commission recommended March 2, 1920, that the uniform rules of Circular C. S. 31 Revised be continued "until experience and careful study demonstrated that other rules would be more effective and beneficial," etc.; but the authority for fuel car assignment had been in the Car Service Section of the Railroad Administration, which had been abolished.

Confiscations.

Because coal cars were not available in sufficient numbers at the mines to meet railroad fuel demands, the railroads resorted to wholesale con-

fiscations to procure the necessary fuel. "Injunction proceedings brought against the practice of confiscation in at least one case resulted in a decree adverse to the carrier" (page 528); and see M. & O. R. R. Co. *vs.* Zimmern, 89 So. 475. Thereupon, on April 15, 1920, the Commission recommended that Circular C. S. 31 Revised be continued in effect, amended, however, to read:—

Reinstatement of Assigned Car Rule, April 15, 1920.

> "Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in R. R. Com. of Ohio *et al. vs.* H. V. Ry. Co., 12 I. C. C. 398, and Traer *vs.* Chicago & Alton Railroad Co., *et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

Service Order 18.

On September 28, 1920, the Commission issued its Service Order No. 18, effective October 1st, and re-issued the rules laid down in its recommendation of April 15, 1920, with the proviso:—

> "That common carriers by railroad may not assign cars for their own fuel and fail to count such cars against the mine's distributive share unless the entire output of such mine is taken by such a carrier for a period of not less than six consecutive months."

This order was cancelled March 24, 1921, and the investigation in this case was instituted simultaneously.

Conclusions of the Commission.

The Commission's conclusion of law is that assignment of cars under the Hocking Valley-Traer Rule is not contrary to paragraph (12); but that the Commission is still empowered to determine whether such assignment is just and reasonable under Section 1, and whether it results in undue preference under Section 3. The conclusion of a majority of the Commission is that assignment of railroad fuel and private cars is unreasonable under Section 1 and discriminatory under Section 3.

Effect of Order on Railroads.

The result of the Commission's order on the Railroads in this case is stated by the District Court (Railroad Record, page 61):

> "The obvious and conceded effect upon the railroads, in times of coal car shortage, will be that no railroad fuel may be transported from the mines operated for the production and shipment of railroad fuel in excess of the capacity of the cars allotted under the pro rata distribution."

The argument of this case is cast under four main heads:—

I. Paragraph (12) of Section 1 of the Act enacts into statute the Hocking Valley-Traer rule of coal car assignment.

II. The Car Service Paragraphs (10-15) of Section 1 of the Act to Regulate Commerce relate to

"Service" of common carriers in "transportation" of interstate commerce. Procuring railroad fuel is not transportation service. The Interstate Commerce Commission is without authority to restrict the legal right of the railroads to purchase supplies necessary to their operation.

III. The order of the Commission is arbitrary in that it is unsupported by the findings of fact disclosed by the reports and in that it undertakes to regulate by indirection subject-matters which are outside of transportation service and outside of the regulatory powers of the Commission.

IV. The Commission's order is a unit; if invalid in any respect, it must fall as a whole.

Treatment of subject of Private Cars.

The primary interest of the railroads in this case lies in the problem of obtaining suitable railway fuel. They are not insensible to the importance of the private car question; but, because the interests of the private car owners are separately defended, the private cars will be dealt with in this brief only as they affect car distribution generally and as they throw light upon the problems of railroad fuel supply by comparison with foreign railroad fuel cars.

II. ARGUMENT.

I. Paragraph (12) of Section 1 of the Act enacts into statute the Hocking Valley-Traer rule of coal car assignment.

Lack of power to make order.

It is the contention of the railroads that the Commission had not the power to make the order with which we are concerned in the present case, this lack of power being due to the fact that Congress has defined the rule of coal car distribution to be pursued by carriers in periods of car shortage.

The determination of the question of the Commission's power depends upon the interpretation that should be given to what is now paragraph (12) of Section 1 of the Interstate Commerce Act, this paragraph having been inserted in the Act by the Transportation Act of 1920.

The car service paragraphs of Sec. 1

The paragraph in question is one of several generally known and referred to as the "car service" paragraphs of the act.

By paragraph (10) of Section 1 of the Interstate Commerce Act, it is declared that the term "car service" shall include *inter alia* the supply and distribution of cars and by paragraph (11) of the same section, the duty is devolved upon railroads subject to the Act, to establish and observe just and reasonable rules and practices with respect to car service.

By paragraph (12) of the same section Congress deals specifically with the subject of distribution of coal cars as a matter separate and distinct from car distribution generally. By the first sentence of this paragraph it is made "the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply," and, in periods of car shortage, "to maintain and apply just and reasonable ratings of such mines and *to count each and every car furnished to or used by any such mine for transportation of coal against the mine.*"

Analysis of paragraph (12).

What we are here concerned with is the interpretation to be given to the direction to "count each and every car" furnished to mines.

It is apparent that by this paragraph (12) Congress has imposed upon railroads certain obligations with respect to the allotment of coal cars in times of car shortage and in determining, therefore, what power is exercisable by the Interstate Commerce Commission with respect to the same subject-matter, the extent to which the power has been exercised by Congress must primarily be determined.

Congress has declared that the railroads must "maintain and apply just and reasonable ratings" for mines served by them and must "count each

and every car furnished to or used by any such mine."

Mine rating.

With respect to the ratings it is doubtless within the power of the Commission to exercise supervision over the subject because the direction of Congress is that these must be just and reasonable and the determination of what is just and reasonable is within the supervisory powers of the Commission.

"Count" of cars.

But with respect to the distribution of cars based upon the ratings we find the express direction that the carrier shall "count each and every car furnished to or used by any such mine for transportation of coal against the mine."

Construing the paragraph solely with reference to the language used, the duty thus devolved upon the railroads would be discharged by a mathematical enumeration of the cars, but any interpretation which would lead to the conclusion that a mere enumeration of the cars placed at each mine would amount to a compliance with the requirements of the paragraph is inadmissible if any other is permissible.

Effect of "count."

It would seem to be clear that Congress intended by the requirement to count the cars placed at each mine to control the number of cars which each mine should receive. In other words that the cars so counted should have some effect upon the distribution as a whole of the cars available.

In order to avoid the conclusion that Congress did a wholly futile thing when it devolved upon carriers the duty "to count" we must, it is submitted, construe the paragraph as imposing upon railroads not alone the duty to count, but also the duty to give effect to the count in the actual distribution of their cars.

It is the contention of the Commission that the paragraph should be given the same construction as if the direction "to count each and every car" had been followed by the words "in the manner to be from time to time prescribed by the Interstate Commerce Commission." The position of the railroads on the other hand is that the legislative history of the paragraph clearly demonstrates that Congress intended thereby to lay down a definite rule of distribution and that the definite rule so prescribed is that which had been previously established by the Interstate Commerce Commission, had come to be a well understood and generally accepted rule of car distribution and was generally defined and known as the rule requiring all cars to be counted against a mine.

The rule referred to had its origin in decisions of the Commission in what are generally referred to as the Hocking Valley and Traer cases, referred to in the statement of the case.

While the rule thus enunciated by the Commis-

sion was not at first acquiesced in by all railroads, it had finally become the well recognized rule of distribution largely as the result of the decision of this Court in the case of Interstate Commerce Commission *vs.* Illinois Central R. R. Co., 215 U. S. 452, in which the power of the Commission to make the rule was sustained, and had been followed and adhered to for many years prior to the enactment of the Transportation Act of 1920.

Legislative history of paragraph (12).

This Act as finally passed was the outcome of two bills, one a Senate and the other a House Bill, and what occurred while these bills were under consideration by Congress very clearly indicates what Congress intended to accomplish by the provision of paragraph (12) with which we are here concerned.

The House Bill.

The House Bill as introduced and passed contained the language of paragraph (12) as it now stands, and while the bill was under consideration by the House Committee on Interstate and Foreign Commerce, the then chairman of the Interstate Commerce Commission was called before the Committee and was interrogated as to the desirability of the enactment of paragraph (12), and the Commission's first report in the present case (page 532) contains the following statement as to what was said by the chairmen of the House Committee and of the Interstate Commerce Commission:

Chairman Clark's understanding of paragraph (12).

"The Chairman: Mr. Clark, are you familiar with the provision inserted in the Cummins bill with reference to coal-car distribution? They have a section devoted to it.

Mr. Clark: I remember there is such a section, but at the instant I do not recall the particular provision.

The Chairman: It seeks to carry into the law the orders of the director general now with reference to car distribution.

Mr. Clark: That leads me to say that in the earlier days of the Railroad Administration this very question of refraining from counting against the distributive share of the mine the cars that were sent for the carriers' own fuel supply came up. Some members of the director general's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. *My understanding is that the rule adopted was based upon the principles laid down by us, and that they are following the practice of counting those cars against the distributive shares of the mines.*

The Chairman: You would be in favor of legislation of that kind being incorporated in any bill, *so as to make it a statutory matter and not really a matter of regulation?*

Mr. Clark: I can see no objection to it; although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The Chairman: The idea expressed by the representative of the coal association was that when Federal control ended there might be a recurrence to the old practice.

Mr. Clark: *Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I can not see any possible objection to carrying it into the statute.*" (Italics ours.)

It is apparent from this colloquy that it was the view of the chairman of the House Committee that the enactment of what is now paragraph (12) would result in the establishment of a statutory rule; that the subject-matter of such rule would not thereafter be a matter of regulation and that the Chairman of the Commission saw no objection to the establishment of a statutory rule because, as he expressed it, what was proposed was the right rule and had stood the test of adjudication at the hands of the Commission and of this Court.

The House Committee Report.

During the pendency of the bill an effort was made to induce the House Committee to substitute the provisions of the Senate Bill, to which reference will be hereafter made, but the Committee declined to make such substitution, and in reporting the bill to the House, after referring to the prevailing car distribution practice, stated (page 533):

> "the Committee follows the decisions of the Interstate Commerce Commission and the present practice and has put in form of law what had been enunciated as proper practice. (Report No. 456, page 17, 66th Cong., 1st Sess.) *Paragraph (12) of the amended section incorporates in the statute a rule laid down by the Commission and upheld by the Supreme Court as to just and reasonable distribution of coal cars among the mines, thus avoiding any possibility of the recurrence of the evil of what is known as 'assigned cars.'* " (Italics ours.)

The Commission in its first report in the present case (page 533) quotes the Report of the House Committee and adds this comment:

> "The only rule which had been laid down by the Commission as to just and reasonable distribution of coal cars among the mines and upheld by the Supreme Court was that stated in the Traer and Hocking Valley cases, sustained in the Illinois Central and Alton cases,"

And it was this rule which had been treated and regarded by the Commission as doing away with what it had determined to be the evil of the assigned cars.

It is apparent, therefore, that in the judgment of the House Committee a statutory rule of distribution had been prescribed of such a character as to avoid "any possibility of the recurrence of

the evil of what is known as assigned cars." But it is equally apparent that if the effect to be given to the count which is required by this rule and to the distribution to be made consequent thereon was left open for the determination of some other body, no statutory rule of distribution had been prescribed and a reversion to the evil of the assigned car was still a possibility.

The Senate Bill.

The Senate Bill, as introduced and as finally passed by the Senate, was also designed to establish a statutory rule and it enjoined upon every carrier the establishment of regulations which should provide "That each and every car furnished or used for the transportation of coal during a car shortage period shall be counted against the proportionate distributive share of the mine receiving or using it and that no car shall be furnished to or used by any mine for the transportation of coal during a car shortage period in excess of the proportionate distributive share of such mine regardless in either case of who the consignor or consignors, or the consignee or consignees, or the owner or owners of the coal loaded or to be loaded into such cars may be, or the purpose for which such coal may be used or intended, or the ownership of such car or cars," and this was followed by a provision making unlawful failure to establish such regulation and to observe the same (S. 3288; see 80 I. C. C. 531-2).

The Senate Bill embodied the rule prescribed by the Commission in the case at bar.

Report of Conference Committee.

As the Senate and House Bills were not in accord, they went to a conference committee which reported (Report No. 650, page 61) as follows:

> "Section 402 of the House Bill required carriers by rail to make just and reasonable distribution of cars for the transportation of coal among coal mines served by them, and, in time of car shortage, to maintain and apply just and reasonable ratings of such mines and to count against each mine every car furnished to it. Section 34 of the Senate amendment required carriers by rail, during any period of car shortage, to make just, reasonable and nondiscriminatory distribution of cars to coal mines, to establish regulations providing for rating such mines and the distribution of cars among them, to count against each mine every car furnished to it, and not to furnish cars in excess of such ratings, an exception being made in the case of cars used for coal necessary for the movement of trains. The provisions of the House bill were agreed to, and are contained in Section 402 of the conference bill."

After final consideration in conference Congress put into statutory form the rule of distribution which had been theretofore approved by the Commission, and declined to substitute the rule embodied in the Senate Bill.

Subsequent to the enactment of the Transportation Act the Commission having issued an order with respect to car distribution, which it was contended by some was inconsistent with the requirement of the Transportation Act, and a resolution having been passed by the Senate directing the Commission to inform it upon what authority this order had been made, responded as follows (page 529):

Commission's response to Senate inquiry.

> "The Commission is of opinion that paragraph (12) of Section 1 of the Interstate Commerce Act does not change the rule of law laid down in the Hocking Valley and Traer cases. *The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States.*" (Italics ours.)

After the receipt of this response the Senate took no action relative to the subject-matter of its resolution, and in its report in the present case the Commission at page 529 calls attention to the significance which should be attached to such failure, its comments being as follows:

Subsequent history of paragraph (12).

> "The language of paragraph (12) of section 1 has remained unchanged. Although our construction of the paragraph was specifically brought to the notice of the Senate, in response to a call for information as to the authority

for the issuance of our order, and although our action in this regard was reported to both the Senate and House of Representatives in the annual report which by law we are required to make to the Congress, there has been no legislation in the three years which have elapsed to correct any error of interpretation upon our part. *A bill declaring that paragraph (12) carried a rule of equal proportionate distribution of cars to coal mines, introduced in the Senate in the Sixty-seventh Congress, first session, was not reported out of committee.*" (Italics ours.)

"If the statute in question is at all doubtful in construction, the construction adopted by this administrative agency in its enforcement, followed for many years, without any attempt of Congress to change it, even when a bill for that purpose was long pending before it, and without any challenge of its correctness by any other department of the Government, while not controlling, is not to be disregarded without the most cogent and persuasive reasons. Robertson v. Downing, 127 U. S. 607."

Reason for statutory enactment of Hocking Valley-Traer rule.

Moreover the Commission has pointed out why in its judgment the substitution of a statutory rule in place of its own rule was desirable (page 531):

"It was clearly within the power of Congress to apply at their convenience the rule,

> which, as is apparent from what has preceded, was a limitation upon a practice of the carriers long existing, which the carriers had claimed the right to perpetuate, and as against the perpetuation of which there stood merely an administrative finding of fact based upon facts as disclosed in records made some 13 years before, binding upon but a few out of the hundreds of railroads subject to the act."

In view of the legislative history of paragraph (12), as detailed by the Commission the conclusion reached by it would seem to require greater support than can be found in its report.

Present attitude of Commission.

The following extract from the report (page 554) embodies substantially what it has to say in support of its present attitude:

> "The rule evolved in the early decisions was not the fruition of ripe experience. The Hocking Valley decision, as we have stated, was in 1907, and the Hillsdale case was decided in 1910. Commissioners Clements and Lane had joined in the reports and orders in both the Hocking Valley and Traer cases. In a dissenting expression in the Hillsdale case, Commissioner Lane, Commissioner Clements concurring with him, referred to the whole question of coal-car distribution as then being in a state of flux, and that on the investigation made by the commission three years before, it was brought out and clearly established

> that the distribution of cars to coal mines was based largely upon interest, prejudice, and pull. Hillsdale case, *supra,* page 387. Subsequent to the Hocking Valley and Traer decisions and other related cases an effort was made to establish rules which would not be open to objection on the ground of discrimination, but the rules were referred to by Commissioner Lane as tentative and experimental and not representing the crystallized experience of years."

Waiving the question as to what length of observance is necessary to give the requisite sanctity to a rule or practice, we confidently submit that whether the rule established by the Traer and Hocking Valley cases had not been in existence long enough to impart to it the requisite odor of sanctity, is not the question with which we are here concerned; that question is whether Congress by what it did intended to continue this rule in effect, and as to this there would seem to be no reasonable doubt.

The argument of the Commission.

In the brief filed upon behalf of the Commission the view which controlled the Commission in dealing with paragraph (12) is thus stated:

> "The Commission has construed paragraph (12) not as requiring pro rata distribution of cars or distribution under the assigned-car rule, but as requiring merely that

all cars must be 'counted' and as leaving to the Commission administrative discretion to determine how they shall be distributed. Assigned Car case, 80 I. C. C. 520, 535. This gives the word counted its ordinary meaning (see Webster's Dictionary)" (page 104).

The further suggestion is made in this brief that to treat paragraph (12) as embodying a statutory rule of distribution would be inconsistent with the first sentence of the paragraph which is viewed by counsel as designed "to vest in the Commission more fully than ever before administrative powers to deal with the difficult and complicated problems of car distribution. To give the counting provisions of paragraph (12) the meaning contended for by appellees would defeat this purpose." (Brief 105.) Counsel, however, are in error in treating the first sentence as intended either to enlarge the power of the Commission or to reconfer existing powers in respect to car distribution.

It was clearly the purpose of this sentence to impose the duty upon a carrier to extend its car distribution to all "the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply." The question whether carriers were under obligation to include in their car distribution, mines located off their lines had been a controverted one and the

manifest purpose of this sentence of paragraph (12) was to impose one other statutory duty upon carriers with respect to the distribution of their coal cars.

That the purpose and intent of Congress in directing the counting of all cars placed at mines must have been to prescribe a rule of distribution complete in itself and consequently neither requiring nor permitting action by the Commission supplementary thereto is, we submit, a necessary inference from the language used in paragraph (12) which makes the failure to count all cars placed an offence.

Significance of penalty provision.

After the requirement that cars should be counted, Congress embodied in this paragraph what follows:

> "Failure or refusal so to do shall be unlawful, *and in respect of each car not so counted shall be deemed a separate offense*, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States." (Italics ours.)

Failure to count is the declared offence, and "each car not so counted" is to be deemed a separate offense.

Now unquestionably what Congress intended by this was to impose the penalty prescribed in re-

spect to each car delivered to a mine in excess of its quota, ascertained by the method of counting defined in the Hocking Valley-Traer rule.

If then Congress intended to penalize the carrier to the extent of $100 for each car delivered in excess of the mine's quota, we must, it is submitted, so construe the direction to count the cars as to make this broad enough to regulate the number of cars which could lawfully be placed by the railroad at a mine, and if we do this, then it would seem inevitably to follow that requirement of the paragraph was intended to establish a rule for distribution, and as we have already endeavored to point out, the legislative history of the paragraph would seem to establish beyond any reasonable doubt what rule Congres had in mind.

The rule embodied in the order of the Commission with which we are concerned is substantially the rule embraced in the Senate Bill to which reference has already been made, rejected in conference.

Interpretation of statute to produce result rejected by Congress.

Two of the members of the Commission construe paragraph (12) as embodying a rule of distribution similar to that embodied in the Senate bill, but such construction is inadmissible under the decision of this court in the case of Pennsylvania Railroad Co. *vs.* International Coal Mining Co., 230 U. S. 184. There a shipper of coal sought to recover in an action based upon unjust discrimina-

tion, the difference between the rate paid and a lower rate which it claimed had been without justification charged other shippers, its claim being that the difference in the rates was the measure of "the damages sustained thereby."

The original bill to regulate commerce as passed by the Senate contained a provision to the effect that the carrier "shall be liable to all persons who may have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period," but this provision had been eliminated from the bill in conference and the present provision substituted by which "the amount of injury suffered" is declared to be the measure of the damages recoverable.

Dealing with the effect to be given to this omission this Court said: "The fact that this provision measuring the amount of recovery by rebate was omitted from the Act as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that Section 8 means the same thing as the omitted clause."

The omission from the bill as finally passed of the rule of the Senate bill should, it would seem, be given the same effect as was given by this court to the omission from the Interstate Commerce Act as originally passed of the rule of damages which had been considered and rejected by Congress.

Any statutory rule supersedes power of Commission.

But if the provision of the Senate Bill in the present case could be regarded as the rule of distribution finally prescribed by Congress, the present order of the Commission could not be sustained because of the consideration that a statutory rule having been established by Congress, necessarily the power of the Commission to deal with the subject-matter of this rule had been thereby ended.

In other words, in determining the power of the Commission to make the order here involved, it is wholly immaterial what rule was established by Congress, provided paragraph (12) contains some effective rule.

Established meaning of word "count."

Congress might have embodied in paragraph (12) the rule as theretofore established by the Commission in extenso, but as the Commission itself points out the requirement to "count all cars" had come to have a well defined meaning and by using this phrase Congress, it is submitted, intended that the same significance should be given to it as it had acquired in connection with the subject-matter of coal car distribution.

On this point the Commission in its first report at page 534 says:

> "The words also had a widespread usage in railroad and traffic circles at the time of the enactment of the transportation act, and that usage was consistent with that expressed by us in our report to the Senate, *supra*. While in the expression of the rule which originated in the Hocking Valley and Traer cases, the words 'count against the mine' were continually being applied as a necessary term in the formula, it was always recognized that the rule with these words in it was not the equivalent of a requirement for equal proportionate distribution of cars assigned and unassigned, to coal mines. With this usage Congress was no doubt familiar, as we are."

Use of words in trade or business.

The rule applied by this court in the late case of O'Hara *vs.* Luckenbach Steamship Co., 269 U. S. 364, in construing a requirement in the Act of Congress under consideration in that case that all "sailors shall, while at sea, be divided into at least two . . . watches" would appear to be directly applicable. This Court said:

> "In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently, the phrase 'divided into . . . watches' is to be given the meaning which it had acquired in the language and usages of the

trade to which the Act relates, in accordance with the rule stated in Unwin v. Hanson (1891) L. R. 2 Q. B. 115, 119: 'If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.' In the understanding of the sailor, a division into 'watches,' as applied to the personnel of the ship, connotes a division as nearly equal as possible."

. . . . . .

Paragraph (12) in junior Federal Courts.

The purpose and effect of paragraph (12) has been before Federal tribunals in several cases and the Commission thus summarizes in its report (page 534) the conclusions reached in three of these cases:

"The question here presented has been passed upon by the Federal courts in three cases. In Corona Coal Co. v. Southern Ry. Co., 266 Fed. 726, and in Cleveland & Western Coal Co. v. B. & O. R. Co., 283 Fed. 995, the District Courts of the United States for the Northern District of Alabama and Northern District of Ohio, respectively, expressed the opinion that the intent of Congress was to put into statutory form the rule theretofore expressed in the Hocking Valley and Traer cases.

A contrary view was expressed by the Circuit Court of Appeals in the Fourth Circuit, in B. & O. R. R. Co. v. Lambert Run Coal Company, 267 Fed. 776, reversing on this point the District Court of the United States for the Northern District of West Virginia, which had found upon this point in consonance with the Corona case. But the Circuit Court of Appeals was itself reversed as having no jurisdiction in the premises. Lambert Run Coal Co. v. B. & O. R. R. Co., 258 U. S. 377. While giving to the opinions of the Circuit Court of Appeals all the respect due to the deliberate findings of such a judicial tribunal, its determination of a question of law, made in a proceeding where no jurisdiction vested, and where the Government as a necessary party was absent, and was not heard upon the construction of the statute, cannot be accorded weight as determinative of this issue."

Paragraph (12) has also been under consideration in another case which arose after the decisions referred to by the Commission. The case referred to is that of Freeman *vs.* United States, 4 Fed. (2d) 13. In that case it appeared that the Receivers of the Denver & Salt Lake Railroad Company were making distribution of coal cars without counting those which were placed at mines to be loaded with fuel for the railroad.

At the request of the Interstate Commerce Commission a proceeding was instituted by the

Government to restrain the Receivers from adhering to this method of distribution. It was objected upon behalf of the Receivers that paragraph (12) did not embody a statutory rule and that resort to the Commission was first necessary in order to determine whether what they were doing was violative of the Interstate Commerce Act.

To this contention counsel for the government, one of whom appeared as attorney for the Interstate Commerce Commission replied as follows to quote their brief:

Commission's argument for statutory rule in Freeman case.

> "Two constructions have been given this statute" (*i. e.*, paragraph 12): "(1) that the provisions requiring the count of each and every car against the mine called for an exact pro rating of all cars, including company fuel cars; (2) in view of the legislative history of said paragraph and the decisions of the Commission and the Supreme Court preceding its passage it has been generally regarded by the courts as a statutory embodiment of the assigned car rule above given. Under either construction it cannot be gainsaid but that there exists a rule established by statute requiring a count of all cars. The determination as to what rule was established by the statute is for the courts and not the Commission. *Since we are concerned with an established statutory rule the question as to whether the carriers' practice of making no count whatsoever of company fuel cars was violative thereof is di-*

rectly cognizable by the court without the necessity of a preliminary administrative inquiry being first had by the Commission." (Italics ours.)

So it appears that the Commission in this Freeman case contended for a construction, which was adopted and acted upon by the court, that paragraph (12) embodied a statutory rule and that consequently action on its part in respect to the matter complained of was not necessary.

It thus appears that the Congress of the United States, five Federal courts, and the Interstate Commerce Commission itself, reached the conclusion that paragraph (12) embodies a statutory rule—and to this list should be added the Government of the United States, authority for making this addition being found in the following extract from the brief filed with this Court upon its behalf in the Lambert Run case:

Argument of United States for Hocking Valley-Traer rule in Lambert Run case.

"The power of the commission to prescribe rules and regulations for the pro rata distribution of cars to mines for the receipt and transportation of coal was first sustained by the commission itself, Railroad Commission v. Hocking Valley Ry. Co. (12 I. C. C. 398) and Traer v. Chicago & Alton (13 I. C. C. 451); and then by this court in Interstate Commerce Commission v. Illinois Central (215 U. S. 452); Same v. Chicago & Alton (215 U. S. 479); and Baltimore & Ohio v. Pitcairn Coal

Co. (215 U. S. 481). The rules and regulations announced by the commission in those cases and sustained by this court were finally enacted into statute by paragraph (12) and they have no relation to emergency requiring immediate action."

The view taken by the Government in paragraph (12) as set forth in its brief in the present case is opposed not only to that which it urged upon this Court in the Lambert Run case, but to that now taken by the Commission.

As we have already pointed out, the Commission's view is that the direction to count means nothing more than a direction to make an enumeration of the cars placed at all mines "leaving to the Commission administrative discretion to determine how they (*i. e.*, cars) shall be distributed."

Present argument of United States.

The Government's present contention on the other hand is that by paragraph (12) not only was the Traer-Hocking Valley rule abolished, but there was substituted therefor a new rule and that the order of the Commission now under consideration is designed merely to enforce the rule prescribed by the paragraph.

> "That further legislation as passed in 1920 must be accepted as showing the intention of Congress either to change the existing rule itself or authorize the Commission to do it." (Government's Brief, p. 36.)

Now, it would be a totally unwarranted assumption that paragraph (12) was enacted to authorize the Commission to change an administrative rule which it had theretofore formulated and followed, because no one could doubt the power of the Commission of its own volition to make any change therein, and we must, therefore, conclude, it is submitted, that of the two hypotheses suggested by the Government, the latter is wholly inadmissible.

Enactment of rule rejected by Congress.

Is the other hypothesis a reasonable one? If the old rule of distribution was overturned by paragraph (12) this can only have come about because a new rule is to be found in paragraph (12) and this apparently is conceded by the counsel for the Government, who find in paragraph (12) the rule which Congress considered and rejected, under which a *pro rata* distribution of all cars is required.

But if such had been its intention, it is inconceivable that Congress would not have expressly directed carriers in times of car shortage to make a *pro rata* distribution of all coal cars among the mines served by them.

If a statutory rule is, as the carriers contend and as apparently the Government concedes, embodied in paragraph (12), the argument in favor of the Traer-Hocking Valley rule is too persuasive to admit of any real doubt as to what was the intention of Congress in enacting the paragraph.

Reference should be made to one or two suggestions made in the Government's brief, although they are not of real importance.

Enactment of part of Hocking Valley-Traer rule.

It is suggested that what Congress did by enacting paragraph (12) was to adopt a part of the existing Traer-Hocking Valley rule, namely, that which required each and every car to be counted, while omitting what is referred to in the brief, page 36, as "a qualification of the rule, *viz.*, that all private cars assigned to a mine might be delivered to it, though in excess of its *pro rata* share of available car supply."

But the Traer-Hocking rule cannot properly be thus described, for it embodied no qualification of a general rule in the sense suggested in the extract just quoted. By that rule the Commission intended to and did provide that all assigned cars must be delivered to those entitled to them and that the unassigned or distributable cars must be distributed on a *pro rata* basis in accordance with the method prescribed in the rule.

Interpolations in Statute inadmissible.

It is further suggested that the contention of the appellees is in effect that there should be interpolated in paragraph (12) after the direction to count each and every car the words "except the private cars and the railway fuel cars of these appellees."

Probably it is not necessary to call the attention of the court to the fact that the appellees are

not asking that any such language be interpolated, but on the contrary, they are admitting that all private and fuel cars must be counted in the manner prescribed in the Commission's rule which they contend was adopted by Congress and put into force as a statutory rule.

Counsel for the Commission in their brief have embodied extracts from the decisions of this Court in a number of cases in which some question of car distribution in periods of car shortage was under consideration. It is difficult to understand what relevancy these extracts or the decisions themselves have to the question involved in the present case.

Cases upholding Hocking Valley-Traer rule distinguished.

In all of these cases the carriers complained of had been following the rule of distribution which had prevailed generally before the Traer-Hocking Valley decisions and in accordance with this rule had given no effect to the assigned cars placed at mines in determining the number of unassigned cars which these mines were entitled to receive. And in all of them the contention advanced upon behalf of the shippers was that these cars must be counted and taken into consideration to the extent and in the manner directed by the Commission in the Traer-Hocking Valley cases.

What this Court, therefore, had to pass upon in these cases was whether the method of counting which had been prescribed by the Commission in

the cases mentioned was or was not the one that should have been pursued by the railroads and consequently what was said with respect to the obligation to count cars had reference to counting in accordance with the Commission's rule, as this was the question at issue in all these cases.

II. The Car Service Paragraphs (10-15) of Section 1 of the Act to Regulate Commerce relate to "Service" of common carriers in "transportation" of interstate commerce. Procuring railroad fuel is not transportation service. The Interstate Commerce Commission is without authority to restrict the legal right of the railroads to purchase supplies necessary to their operation.

As cars necessary for procuring railroad fuel are in fact not available and can not be made available for common carriage, placement of them for loading is outside the jurisdiction of the Commission. Interstate Commerce Commission *vs.* Illinois Central R. Co., 215 U. S. 452, decides no more than that assigned cars are factors to be taken into account in the pro-rata distribution of unassigned cars for commercial shipments. As if to make the law clearer on the question which arises in this case, the Congress since that decision (1910) was careful in subsequent car service legislation to confine the Commission's power over coal car distribution to distribution for common carriage.

Congressional legislation contemplates exclusion of railroad fuel cars from general distribution.

Car Service Amendment, 1917.

40 Statutes at Large 101.

The amendment of 1917 defines "car service" as including "distribution . . . of cars used in the *transportation of property* by any *carrier,*" etc. Emergencies in "transportation of property" are contemplated and provided for and the Commission is empowered to make "such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people,"—not a coal movement to points of fuel needs by the railroads in preparation for rendering public service. Again, in the revision by the Transportation Act of 1920 of the car service paragraphs of Section 1, paragraph (12) was newly inserted and states the substantive duty of the carrier "to make just and reasonable distribution of *cars for transportation of coal* among the coal mines *served by it*"; and when the car supply "available for such service" is insufficient the carrier must rate the mines and "count each and every car furnished to or used by any *such mine* for transportation of coal against the mine." Paragraph (13) requires filing of car service rules with the Commission, and the Commission may direct that the rules shall be incorporated in the carrier's *rate schedules.*

Revision by Transportation Act, 1920.

Car distribution requirements confined to public duty of common carriage.

These car service provisions, using the phrase "transportation of property" in the sense of common carriage, exclude from the field with which

the Commission is concerned movements of coal belonging to the carrier, just as the Commodities Clause (paragraph (8) of Section 1) takes out of the inhibition of that clause "such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." Performance by common carriers of their public duty of transportation is plainly spoken of throughout this legislation and not the proper activities of the carriers in procuring their supplies or fuel. Service of common carriage and service of the public in transportation is meant, in spite of the labored argument of the Commission (page 714) based on the Standard Dictionary that "service" may mean "self-service." This is an unusual, secondary meaning, not the ordinary. The word and purpose of Congress and context forbid that unnatural meaning.

The present argument applies with particular force to the case of on-line mines of which the railroad takes the entire output for its own use. Such mines ship no coal in commerce.

Always the court will bear in mind that the Commission's power is limited by statute. Commissioner Potter, dissenting, has the limitation in mind when he says (page 575):—

Railroads' right to purchase supplies.

"The law authorizes regulation of transportation but not of the purchase of supplies, except in special instances not related to the

> car problem. Railways admittedly have the right to purchase fuel and other supplies where their judgment suggests. They require this right in order to obtain deliveries at points most convenient for use, economize haul and storage, avoid congestion, select fuel most desirable to meet varying conditions and power requirements, and promote efficiency and economy in general."

Commissioner Potter's exception of regulation "in special instances not related to the car problem" is an allusion to the provisions of Section 10 of the Clayton Act—38 Statutes at Large 730. The District Court remarked on this point: "And Congress has not otherwise invested the Commission with control over the expenditures of railroads except under the provisions of Section 10 of the Clayton Act, 38 Statute at Large 730, which has no relation to the matters in issue here." The objective which Congress had in mind in the Clayton Act is the policing of the placing of purchases where there may be community of interest in buyer and seller which might prevent the railroad from securing the lowest prices. Higher prices would be likely if the railroad is forced to distribute its purchases pro rata with its fuel cars. The provisions of the Clayton Act disclose the extent to which Congress has been willing to go in regulation of railroad purchases of supplies. There is no justification for the Commission seeking by

Extent of Congressional regulation of purchases.

indirection to reach what Congress has intended shall be let alone.

Subject-matter and effect of Illinois Central Case, 215 U. S. 452.

The Commission seeks to support its present assertion of jurisdiction by the authority of Interstate Commerce Commission vs. Illinois Central R. Co., 215 U. S. 452. The car distribution practice before the Supreme Court was the practice prior to 1907. The mine was receiving home line fuel cars, and *in addition* was receiving its share of system cars. The Commission had made an order which embodied the Hocking Valley-Traer Rule,—that the fuel cars should be counted in the mine's *pro rata* share, and no more unassigned cars should be given to the mine than enough to make up with the railroad fuel cars its total *pro rata* share. The Commission's rule permitted railroad fuel cars to be placed in any number. The practice of assignment was not questioned and assigned cars figure in the case only in so far as they affect the distribution of unassigned cars for commercial consignment. The jurisdiction of the Commission to prescribe the Hocking Valley-Traer rule was sustained. No argument was made to this Court that the railroads should not be allowed to assign cars to their fuel service or that private car owners should not be permitted to consign their cars at will.

In the brief for the Commission in this Court in the case at bar (page 88) a sentence from the

opinion in the Illinois Central case is stripped from its context and quoted to the effect that coal cars as instruments of interstate commerce "are embraced within the Governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one." The subject-matter of the case and the context will show that the Court was speaking of the just and nondiscriminatory distribution of coal cars as affecting commercial shipments.

It is impossible to perceive discrimination in the placement of coal cars for locomotive fuel at an on-line mine of which the railroad takes the entire output of coal and from which no coal is commercially consigned. The "just and equal distribution, and the prevention of an unjust and discriminatory one" which this Court declared in the Illinois Central case was within the administrative jurisdiction of the Commission presupposes the existence of a mine or mines engaged in shipping commercial coal. No discrimination against commercial mines can arise from the fact that the railroad takes the entire output of necessary fuel from a mine on its line.

Decision of this Court have shown that such matters as fueling activity is not common carriage: Interstate Commerce Commission *vs.* B. & O. R. Co., 225 U. S. 326; Santa Fe, Prescott & Phoenix

Ry. Co. *vs.* Grant Bros., 228 U. S. 177; United States *vs.* Ohio Oil Co., 234 U. S. 548.

In Ohio Oil Company Case, *supra,* where the Court had to consider an oil pipe line over the operation of which the Act to Regulate Commerce had been extended by amendment the Court said: "When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the Act, the transportation being merely an incident to use at the end." As the District Court said in this case, the Commission "has not had conferred upon it the power to determine for the railroads the business methods and practices by which they may in the ordinary conduct of their business provide themselves with fuel."

III. The order of the Commission is arbitrary in that it is unsupported by the findings of fact disclosed by the reports and in that it undertakes to regulate by indirection subject-matters which are outside of transportation service and outside of the regulatory powers of the Commission.

Scope of judicial review of Orders of the Commission.

The expediency of an order of the Commission within its statutory administrative powers is not subject to judicial review. But this Court in United States *vs.* Atchison, Topeka and Santa Fe

Ry. Co., 234 U. S. 476, observed that a review can always be had where the Commission has exercised its power "in such an arbitrary way as to amount to the exertion of authority not given, etc." In Interstate Commerce Commission *vs.* Union Pacific R. R. Co., 222 U. S. 541, this Court held that the Commission's orders are final, unless they are:—

> "(1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that . . . the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Grounds of legal invalidity of Order.

The reports of the Commission show that the Commission has transcended the limits of the sound discretion it must exercise and has traveled outside of the substance of the power confided by Congress.

Agreed premises of fact.

It is stated in the majority opinion that certain premises meet general acceptance. In the first place, it is said that all parties to the controversy are agreed that the railroads of the country, as carriers of coal and other commodities, must in

some lawful way be assured of a steady supply of suitable coal. It is stated further, that whatever means be adopted, "emergencies will occur when the supply will fail unless the railroad is enabled by some means within the law to take sufficient coal ahead of less necessitous uses to keep the flow of traffic going as the public interest requires." Again it is said, "there is no dissent from the proposition that confiscation of fuel coal by railroads is a practice to be avoided." And finally, "it seems to be generally accepted that the public interest requires that the carriers shall not be subjected to unreasonable prices" (page 535). The Commission recognizes that in some way these four conditions must be met.

Prior necessity of railroad fuel.

Locomotive fuel coal is burned for just one purpose—to give the public regular and ample freight and passenger transportation service. If the fuel supply fails, the service fails; if the fuel supply deteriorates, the service deteriorates. The connection and result are immediate. Accordingly, we must assume, as the Commission does, that some lawful way must be found to insure priority for railroad fuel at all times, including times when there are not enough cars available at the mines to meet all demands. It is futile to talk of undue preference in this regard, for the preference is of inherent necessity. The Commission, pointing out the inconveniences of assignment of cars from the

Suggested ways of avoiding assignment.

viewpoints of the coal trade and of mine operator and seeking to find other ways by which the railroads' prior necessities may be met, considers with approval the suggestion by complaining coal operators of four courses for avoidance of assignment of fuel cars:—

> "(1) By storing more substantial amounts of fuel coal at points of consumption during periods of inactive demand upon the part of the public, which, it is claimed, can be done without undue expense; (2) by a wider distribution of fuel contracts among producing mines; (3) by contracting that a certain proportion of the coal produced and to be shipped shall be carded for railroad use before deferred customers are supplied; and (4) by order of this commission suspending the applicable rules as to equal distribution in special cases of real emergency, under the powers conferred by paragraph (15) of section 1 of the act." (Page 552.)

(1) Increased storage.

As to the method (1) the railroads are given no guidance by the Commission as to the amount of coal they should store in prudent foresight. The

Undefined Extent.

Commission does not suggest that the railroads of America can store enough coal to avoid the necessity of assigned cars altogether or some other means of securing a proper supply of coal. No one can foresee such so-called car shortages as are described in this record, much less their

severity or duration. The Commission speaks of the "almost continuous car shortage" of the year 1920 "when the supply ran as low as 50 per cent. for extended periods" on the Carolina, Clinchfield & Ohio Railroad (page 707).

Extent of present storage efforts.

In its second report the Commission mentions (page 713) the collective result of the railroad's efforts at storage: "This table showed railway coal stored on November 1, 1921, to be 11,701,736 tons, on October 1, 1922, 5,423,195 tons, and on October 1, 1923, 17,663,448 tons." The Commission also mentions the tremendous extent of the efforts at storage by individual railroads, ranging from 13 per cent. of the annual consumption by New England Lines up to a supply for 90 to 100 days by the Canadian National Railways, see pages (537-541) and (708-712).

Storage piles.

Railroad fuel needs vary with density of traffic and great storage piles would have to be placed in densely populated centers, or else the coal would have to be rehandled in cars from outside points in assigned cars. No one suggested that assignment of cars to storage piles is unreasonable or discriminatory, or that the number of cars necessary to move the coal from the pile be limited in times of car shortage to a *pro rata*. No practical or legal difference exists between coal stored above ground in a stock pile and coal stored below in a mine.

Cost of Storage.

Individual railroads testify to the expense of storing and picking up coal: from 70 cents per ton by the Pere Marquette, page 538, to 25 cents by the C. B. & Q., page 541. As to the railroads which have coal mines on line, the cheapest storage is storage in the mine. This court will bear in mind the express injunction of the Act to Regulate Commerce of efficient and economical management,—see paragraph (2) of Section 15a of the Act.

Extent of Storage for management of each railroad.

The judgment of individual carriers as to prudent storage, in view of transportation, geographical and weather conditions, is alluded to in other parts of the reports. The Commission does not say that the individual efforts or the collective result, are inadequate; nor that other coal consumers do better in this regard, all circumstances considered. And the Commission does not and from the very nature of the subject cannot say how much more storage should be undertaken. Obviously storage, though admittedly expensive, may tend, as the Commission suggests (page 724) to level the demand in times of stress. But of necessity the extent of storage must be left to individual management, and in the absence of defined criticism by the Commission of the result, the railroads must be presumed to have done their duty.

(2) Wider distribution of fuel contracts.

Method (2), of wider distribution of fuel contracts, takes no account of grades, sizes, and quality of coal required for railroad operation—a mat-

ter described in the testimony of the individual railroads abstracted in the majority opinions—see as to the Illinois Central (page 537); the B. & O., (page 539); the New York Central (pages 708-9). The Commission concedes that the railroads must be assured a steady supply of "suitable coal." And dissenting Commissioner Potter emphasizes the fact in his vivid description of the details of the necessity at page 576.

Extent of distribution undefined.

The suggestion tends toward a pro rate among all producing mines of fuel contracts of the originating railroad. At least this is the only sense that can be given to the assertion in the Commission's Brief (page 3) that the order "did not require railroads to forego the use of their cars in obtaining their coal." How widely the distribution of fuel contracts should be spread by the railroad which has to purchase coal from mines on the lines of other railroads is not made clear; but it cannot be maintained that a railroad should make contracts upon which depend its ability to render public service with every man who happens to be in the coal business. No answer is suggested to the right of the railroads to purchase coal from producers who have suitable coal to sell for their peculiar needs, which will be urged elsewhere in this brief, or the correlative right of sellers of coal to decline to make such sales.

No effect of insuring deliveries.

Just how the suggestion would tend to insure procurement of necessary railroad fuel, is not explained. Even if purchases be more widely spread, still the necessities of the railroads remain the same and prior performance of the railroad fuel contracts will have to be insisted upon in some lawful manner. This suggestion of spreading purchases seems irrelevant.

(3) Priority clauses in fuel contracts.

Conceivably, the railroads might contract for preferential deliveries, suggested as method (3). In fact a preference must of necessity be implied in such contracts without an expressed preference clause. Everybody knows when such contracts are made that the railroad must have its coal and must have it first or the service will break down. However the matter may be theorized, the fact is immovable. A pertinent case of singular theoretical interest and apparently necessary result is Springfield Light, Heat and Power Co. *vs.* Norfolk and Western Ry. Co., 260 Fed. 254. Railroad fuel contractors will fall in arrears in times of stress and will, absurdly enough, demand transportation while denying a necessity of motive power, as the Commission observes in the instance of the C. C. & O. Ry., in the present case (page 707). On the ground of necessity the court in the Springfield case upheld the railroad's prior right to fuel as against the would-be shipper's demand for transportation.

Priority inherent.

Judicial enforcement of priority clauses.

A contract priority clause for railroad fuel has been enforced in the junior Federal courts as against the shipper's effort at commercial consignment: Phoenix Portland Cement Co. *vs.* B. & O. R. Co., 263 Fed. 230, affirmed by Circuit Court of Appeals, 269 Fed. 136. The case suggests the necessity of some way of meeting the refusal of some operators to deliver railroad fuel due contract. Without assigned cars, the railroads may find, even with a priority clause, that they have purchased not coal, but lawsuits.

Practical possibility of priority clauses.

Moreover, the suggestion of priority clause entails consideration of the necessity of another correlative clause, obligating the operator in making contracts with others covering coal from the same mine to specify that the obligation in such other contracts is junior to that of the railroad fuel contract. Whether operators selling and consumers purchasing would, as a practical matter, consent to such clearheaded admissions of the possibilities is doubtful; probably an addition to the price of railroad coal would be demanded.

Priority clauses not complete remedy.

The general use of contract priority clauses strictly observed by the operators would produce the necessary fuel only where the deliveries under the contract come within the car allotment. Thus, if the railroad contract calls for 75 per cent. of the mine's capacity, the necessary fuel could not

be obtained in entirety under a 50 per cent. car supply. And priority clauses would not help at all in the case of contracts for the total output of the mine.

Similarity of priority clauses and assignment in result.

Moreover, priority of right, whether express or implied in the fuel contract, is only another method of assigning cars. Whether the railroad car-marks cars for loading with railroad fuel coal only, as is the case in assignment, or whether without car-marking the cars, the railroad insists, (under a preference clause as in the Phoenix case, or without one as in the Springfield case), that they shall be loaded only with railroad fuel in preference to commercial consignments, is immaterial in practical view. By suggestion of priority clauses in the fuel contract the Commission is advocating the same preference as between purchasers, as indeed is inevitable.

(4) Emergency orders by Commission

The final suggestion, method (4), which the Commission reiterates in its reports (pages 552, 724), is that railroad fuel necessities in time of car shortage may be regarded as creating an emergency, whereupon the Commission may exercise its emergency power under paragraph (15) of Section 1. Grave doubt may be expressed whether such a reliance is practical under the circumstances. The railroads will inevitably find themselves scrambling for coal in a runaway market without time to go to the Commission for priority

orders; and the Commission will have no time to give the matter sufficient consideration to issue an order which will do justice to all concerned. Perhaps the carriers will be offered coal but at prices so high as greatly to increase operating expenses. In such likely situations the Commission will find itself functioning as a price regulating body; inevitably it will be forced into the position of saying to coal operators that coal must be furnished at a certain price or an emergency order permitting the use of assigned cars will follow. There seems to be no answer to the argument of the dissenting opinions, that when the majority opinion concedes that priority orders will probably have to be used, the case in favor of an assignment of cars has been made.

may result in price fixing.

The dilemma is whether the railroads should administer a rule under proper restrictions or whether the Commission should issue special orders in emergency without a rule. It is the theory of the Interstate Commerce Act that the railroads shall be operated by their owners under Commission regulation. It is not the theory of the law that the railroads shall be operated by the Commission using the owners merely as agents. The conclusion of the Commission that cars may be assigned by the Commission under priority orders rather than through the regulated action of the carriers reverses the theory of the Act.

Theory of Federal Statutory regulation.

Effect of Emergency Orders.

But if we can assume that the Commission's action would be prompt and automatic, as is necessary, priority orders would issue and in effect assignment of cars to those mines already obligated by contract to furnish railroad fuel would result; or if, under the Commission's direction, the assignment were to mines with which the railroads had no fuel contracts, the procurement, price and grade of coal would be at haphazard. Because the action of the Commission must be practically automatic we come back again to an assigned car rule. It is hard to see why the inevitable rule may not be recognized and sanctioned in advance. The rule was designed to avoid emergencies, but the Commission now prefers to omit precaution and treat these evils piecemeal after they arise. Or as dissenting Commissioner Hall puts the matter (page 566), the assigned car rule tends "to prevent recurrence of emergency. Priority orders deal only with the emergency after it has come."

Assignment tends to avoid emergencies.

Of the Commission's four suggestions the District Court said:

> "As heretofore stated, there is no finding anywhere in the report that the railroads have mined, or purchased under contract, and shipped greater quantities of fuel coal than has been necessary for the operation of their roads at any time during prior car shortages. By order of the Commission, however, they

are prohibited from using for their fuel necessities more cars during shortage periods than their distributive pro rata share with commercial mines. They may not find it to tend towards efficiency or economy to adopt any one of the other methods proposed for obtaining their fuel supply. Storage in large quantities may be impracticable and would appear of necessity to be more expensive than the present method of storage in the mine, as it would involve additional use of cars and locomotives to carry the coal from the mine to the point of storage and the cost of a second loading after the cars had been loaded at the tipple of the mine and transported and unloaded at the storage pile. The second method would probably lead to demands on the part of the mines, among which their orders would be distributed, for excessive prices for coal, which, the Commission finds, obtain in time of car shortage, and the further probability should be considered that the necessary class and quality of fuel coal varies with different conditions of transportation. The same difficulties would be present, no doubt, in the suggestion of contracting for preferential deliveries by having coal carded at the mines. And it is not shown that preferential contracts would aid in any manner toward the desired result of increasing the available system cars for general distribution.

"We think it clear that the Commission has misconceived the purpose of Paragraph

(15) of Section 1. It empowers the Commission to act when it is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists. It is then empowered to suspend the operation of any or all rules, regulations, or practice then established with respect to car service and to make just and reasonable directions with respect to car service without regard to ownership as between carriers. The clear intent of Paragraph (15) is that it shall apply only in cases of emergency—that is, of unexpected conditions which may arise and which have not been sufficiently foreseen or long enough in effect to afford an opportunity to provide for them by action on the part of the carriers on their initiative or under the ordinary supervisory direction of the Commission. The emergency power is not given to the Commission to provide for conditions which are anticipated as the necessary result of standing orders prescribed in accordance with the other paragraphs of the Act and thus to add to the ordinary power exercised by standing orders. Moreover, the emergency orders of the Commission must be just and reasonable, yet it is the apparent intention of the Commission to decide in advance that it will, under its emergency power, substitute for what it now finds to be a just and reasonable order emergency orders putting into effect in whole or part the rule which it is now condemning as unjust, unreasonable, and discriminatory." (Railroad Record, page 70.)

Suggestions for avoidance of assignment inadequate.

The Commission does not say and can not say that any one or all four of these suggestions or methods will obviate the necessity of assigned cars (page 552):—

> "Perhaps singly none of these suggested courses would suffice, but in combination they would greatly mitigate the results which the respondents claim would follow the abolition of the assigned-car privilege."

Commission's argument that assignment is not necessary —non-assigning railroads.

The Commission argues (page 536) that assignment of cars for railroad fuel is unnecessary because some of the railroads have not assigned them or have assigned them for only part of their fuel. Assignment is not universally practiced because so-called car shortages and fuel contract delinquencies are not general and total and constant. The facts are nowhere denied by the Commission that on some railroads and at some times on all railroads the prior necessities for railroad fuel have to be enforced by prior requisitions. And this is enough to demonstrate the necessity of assignment.

No other effective way of securing railroad fuel.

Without the use of assigned cars no way has been found of assuring the railroads an adequate, dependable supply of suitable coal. Commissioner Hall in his dissent (page 568) recalls and quotes as true today what the Commission said on this point in Assignment of Freight Cars, 57 I. C. C. 760, 766:—

> "No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the Commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under federal control and the production, distribution and marketing of coal was under a war time federal administration."

Contrasted necessities of other utilities.

The necessities of other public utilities,—ships, hospitals, &c.,—are mentioned by the majority (page 553), as if in answer to the railroad's necessity. The controlling difference is suggested by Commissioner Hall (dissent, page 565) "that the railroads reach the mines and the other utilities do not. Before they can use the coal the railroads must bring it to them. Therefore in their interest, and that of the public they serve, the supply of fuel for the railroad service comes first in importance as well as in time of use." Moreover the physical situation of other public utilities is likely to be different. Ordinarily they use their coal at one place and coal can be there stored without the necessity of moving it again before use. But whatever may be the differences or similarities,

the priority of the railroad's necessity is obvious, as Commissioner Hall has pointed out.

Distinction between discrimination and unreasonableness.

This court will note a difference which the Commission suggests between the exercise of its power under Section 3 in prevention of undue or unreasonable discrimination and the exercise of its power of enforcing reasonable regulations affecting car service under paragraphs (6) and (11) of Section 1. To mark the difference the Commission observes, discrimination is not an essential ingredient of reasonableness (page 717). Perhaps the Commission feels impelled to such a distinction by reason of its complete change of front in condemning the Hocking Valley-Traer Rule, which for years has had the Commission's approval. The Commission notes that the basis of its decisions in the Hocking Valley and Traer cases was discrimination (page 525) and says at (page 531):—

Hocking-Valley-Traer cases considered discrimination.

> "Up to the time of the enactment of the transportation act, 1920, our findings as embraced in the *Hocking Valley* and *Traer cases* had been bottomed upon the fact of discrimination, and we had not attempted to prescribe a rule as reasonable. We had no occasion to pass upon that question after the car-service amendment of 1917 was enacted until the close of Federal control."

Present Order based on discrimination and unreasonableness.

Now, however, the Commission bases its condemnation of assignment of cars upon findings of unreasonable practice under Section 1, as well as undue preference under Section 3.

True it is that the present case is broadly different from the Hocking Valley-Traer line of cases. They dealt primarily with distribution for commercial shipments of unassigned system cars, a subject strictly within the Commission's purview. But assignment of railway fuel cars was upheld as a necessity in the Hocking Valley Case, 12 I. C. C. at page 405 and in the Traer Case, 13 I. C. C. at page 457. Before a railroad can become a common carrier of anything it must already have become a consumer of coal. The inherently necessary preference in procurement of fuel coal cannot be pronounced undue within the prohibition of Section 3 of the Act; nor can an unavoidable practice of car distribution be called unreasonable within the meaning of paragraphs (16) and (11) of Section 1.

Inherent necessity as affecting finding of unreasonableness.

Discrimination Under Section 3.

Not every discrimination illegal.

Not every discrimination is illegal—only that which is "unjust and unreasonable." The Act, as this Court has observed, does not "attempt to equalize fortune, opportunities, or abilities"; Interstate Commerce Commission *vs.* Diffenbaugh, 222 U. S. 42.

As against the charge of discrimination, necessity was the Commission's justification when it promulgated the assigned car rule in the Hocking Valley-Traer cases. The record in the present case contains no facts different in principle from the facts in the Hocking Valley-Traer line of cases. The objections specified by the coal operators in Interstate Commerce Commission *vs.* Illinois Central R. Co., 215 U. S. 452 (where the Commission's authority to promulgate the Hocking Valley-Traer rule of assignment was sustained), are the same objections as are now urged—see the note on pages 467 and 468 of the opinion. Nor has the statute law of discrimination been changed in all the years between 1907 and this proceeding: Central R. Co. of N. J. *vs.* U. S., 257 U. S. 247, 259, 260. In this case the District Court said of the Illinois Central case: "there was nothing decided in that case adjudging as an unlawful discrimination the assignment of either class of cars in excess of the pro rata share of the mine, so long as they are counted against the distributive share of the mine." (Railroad Record, page 69.) True, the Commission may change its mind, but the fact may as well be frankly recognized that the Commission is denying without change of material circumstance a rule that has been expressly promulgated with its sanction against objection of discrimination and relied upon in business of enormous importance.

Discrimination features same here as in past cases.

Effect on mining industry of railroad fuel needs.

That advantages flow to the mine operators and their labor for contracts for supply of "nearly 28 per cent. of the total" (of bituminous coal) "consumed and exported by the United States annually" (page 536) is obvious. The railroads must have that coal and must have it in regular, dependable quantity. However it is procured, the business of supplying coal will of course have its favorable effect on costs of production and steady employment of mine labor (pages 551-2). A railroad contract is likely to be a desirable contract—and it must be filled with regularity.

Situation of railroad-controlled on-line mines.

Particularized arguments against the conclusion of carrier discrimination may be made from the individual situations of some of the railroads. Thus, some railroads own or control the entire output of certain mines on their own rails,—"a somewhat different situation" as the Commission admits (page 551). These output mines are operated solely for the fuel supply of the railroad. The coal is owned and mined and loaded by railroad labor into the cars or locomotive tenders of the railroad, is not commercially consigned, and never leaves the rails of its owner.

Right to procure coal from them in cars.

Railroad-owned and controlled mines are private investments. The Commission has nothing to do with ownership of the mine or production or consumption of the coal. On the assumption which must be made in this case that the railroad is pro-

vided with a legally sufficient supply of cars for transporting commercial coal, the right of the railroad to acquire other cars and use them in fueling itself from its own mine seems, on principle, unquestionable.

Objection to assignment of cars to controlled mines.

The Commission expresses objection to assignment of cars to railroad-owned mines at page 552 of the opinion:—

> "Should the privilege of assigned cars be restricted to mines of railroad ownership, the effect would be to encourage the railroads to buy mines and thus increase the present number of assigned cars, or else to induce them to open new mines of their own ownership, which would not only have the same results, but would undesirably add to the capacity of the already over-developed industry of bituminous-coal mining."

Regulation of mining industry.

Here the Commission regulates the coal mining industry through the railroads' fuel purchases. By hypothesis there is no competition with mines selling commercially. The only possible way the commercial mine can be injured is by reason of the effect of the railroad mining operation on mine labor or by reason of the fact that the commercial mines may not sell so much fuel coal to the railroads. Neither of these matters is within the Commission's jurisdiction as dissenting Commissioners Hall (page 566) and Potter (page 575) observe.

And the sole objection of the Commission above-quoted to railroad operation of mines implies that the assigned car makes for efficiency and economy of railroad operation.

Effect of assignment on mine labor.

The Commission now finds unjust discrimination at such mines because labor in a neighboring mine may be less satisfied (page 550). No way of avoiding this result is suggested. If the railroads are to get with regularity (and they must) a vast volume of suitable coal, necessarily mines which can supply it will be operated with regularity. If the railroad output mine is cut down to a *pro rata* share of cars, the rest of necessary fuel must be bought somewhere else. If it is bought from one commercial mine, the miners there will be preferred; if the purchases are spread (assuming they can be spread in a runaway market) then something approaching a compulsory *pro rata* distribution of railroad coal requisitions results,—and that without regard to quality or convenience of location of the coal.

Ground of opposition by organized labor.

The opposition of organized mine labor can only be based on a theory that if part time employment exists in some mines, then no mines should be permitted to work full time. Of course full time is desirable, as everyone admits, and full time may be attained in a total output railroad fuel mine. In an admittedly over-developed industry the demand of labor is that no employer shall attain satisfactory conditions because some do not.

Some railroads receive coal direct from their controlled mines into the bins of their coaling stations, or locomotive tenders: the B. & O. receives 14 per cent. of its annual consumption of six to seven million tons directly into locomotive tenders (page 539) and the C. & O. approximately 300,000 tons out of an annual 2,500,000 tons (page 540). How far does the Commission's so-called principle of discrimination go in this situation? Must the railroad, out of consideration for labor in neighboring mines, deliver into its bins and tenders only a *pro rata* of its necessities, even though coal cars and coal car distribution are totally unaffected save by relief? If not, the "unjust and unreasonable" discrimination will in part remain: for the only effect of the discrimination in such case is uneven occupation of mine labor. Other absurd but illustrative queries suggest themselves: Is a locomotive tender a coal car? And how could tenders be pro rated under the tipples?

Conceived effect of Commission's theory on coal delivered direct into locomotive tender.

Home line fuel cars placed at mines of which the total output is not controlled by the railroad are in this status: part of the output of such mines may be under contract for commercial delivery, but it cannot be delivered unless the railroad gets the necessary fuel coal first. Car distribution is affected only upon the hypothesis, contrary to the fact, that if the railroad needed less coal or no coal at all, then the railroad coal cars would be available

Part-output mines are in same legal status.

for commerce. The hypothesis denies, in whole or in part, the possibility of commerce. The same conclusion is unavoidable with regard to foreign railroad fuel cars, whether consigned to total or partial output mines and for the same reasons.

Effects attributed to assignment greater in times of car plenty.

And finally it is to be observed that all the inequalities and inconveniences attributed to the assignment of cars in times of car shortage, are the same in times of car plenty when assignment is not practised,—even greater, for an over-developed market is sluggish in times of car plenty, and the operator's investment and mine labor are then more likely to be lying idle. The Commission has found that the condition of car shortage is abnormal. The argument is vividly expressed by dissenting Commissioner Daniels, at page 571.

The Commission lays particular stress on discrimination in considering assignment of private cars by the orders of their owners. That shippers may furnish instrumentalities of transportation is expressly recognized and contemplated in paragraph (13) of Section 15 of the Act. There is necessity for the assent of the railroad, seeing that the primary duty lies upon it to furnish adequate car supply, and, as this Court said in Atchison, T. & S. F. R. Co. *vs.* U. S., 232 U. S. 199 (1914), at page 214: "Whatever transportation service or facility the law requires the carrier

to supply they have the right to furnish." The charters of some railroads contemplate the transportation of commodities in privately owned cars: Boyle *vs.* P. & R. Ry. Co., 54 Pa. 310; Logan Coal Co. *vs.* P. R. Co., 154 Fed. 497, 500, and U. S. *vs.* B. & O. R. Co., 154 Fed. 108, 114. The emergency paragraph (15) of Section 1, empowers the Commission to make directions with respect to car service "without regard to the ownership *as between carriers* of locomotives, cars, and other vehicles," etc., recognizing the private car owner's rights even in times of emergency.

Congress has recognized rights of private car owners.

The occasions upon which the subject of private coal car ownership has been specially brought to the attention of Congress, and the efforts to induce Congress to abolish private cars and the assignment of private cars, have been noticed. Suffice it to say at this point that Congress has steadily recognized and preserved the rights of the private car owner. The private car owners will argue that the main cause of the shortage—overdevelopment of the coal mining industry—is outside of their control, as it is outside of the control of the railroads, and that their rights, recognized by Congress, to protect themselves against the excesses of an industry upon which they must depend cannot be taken away by the Commission.

Private car owners disclaim disproportionate share of railroad facilities.

Private car owners disclaimed before the Commission and will disclaim here, any right to more than their proportionate share of motive power, tracks and like facilities. If preferences have been granted in the use of motive power or railroad tracks the Commission has ample powers to prevent the abuse. If there is shortage in other railroad facilities, they may be equally rationed among all commercial users, as the car owners agree. Such emergency cannot justify an order which menaces railroad fueling. Such an order may directly increase the shortage of motive power.

Commission not empowered to abolish private cars.

In the present status of legislation the Commission is not empowered to abolish private cars. And abolition is the effect of its present order. Private cars have no value except in time of car shortage and then only to the extent that they afford their owners a larger car supply than the pro rata of system cars. The necessary effect of the Commission's order is not obscured by the suggestion of the majority that use of the private coal car is not prohibited (page 737).

Reasonableness Under Paragraphs (6) and (11) of Section 1.

Attempting to follow the Commission's distinction between unreasonableness and discrimination, we must observe the difficulty of showing that the assigned car practice is unreasonable

without applying the test of discrimination. No one can say that a railroad acts unreasonably in furnishing sufficient cars to meet its fuel requirements to the coal mines from which it produces or purchases its fuel. Not to do so would be improvident and unreasonable.

Necessity justifies assignment.

At several points in its two reports the Commission notes a suggested effect of the assignment of cars upon the price of railroad fuel. The suggestion is that assurance of car supply is an attraction, presumably in addition to volume of purchase, low selling cost, certainty of pay and permanency of patronage. The charge of beating down fuel prices with assigned cars was distinctly made by opponents of the assigned car (see page 542). The Commission in its first report deemed the charge unfounded, saying (page 551):—

Effect of assignment on price of coal.

Charges of price coercion not supported by record.

> "The record does not support the statement more often made to us outside this record than in it that the railroads deliberately and directly use the assigned-car privilege as a means of coercing unreasonably low prices for fuel. Mine operators prefer to have the assurance that cars will be furnished for railroad fuel coal, and a promise of this character is one of the factors which influences the making of the contract. If the operators do not have this assurance, there would be a higher price. Without doubt in many cases the assurance of a full car supply tends to bring the

> railroad buyer and mine-operator seller together upon a lower price basis than would otherwise be agreed upon without that factor being mentioned in the negotiations at all; in some instances the assurance of a good car supply is named or advertised as an essential consideration. For the present we need give this consideration only as it bears upon the fact previously commented upon, that the commercial-mine operator is sometimes forced out of the commercial business and is compelled by his necessities to take advantage of the assigned-car privilege and to sell his product to a different class of users at a lesser price than he otherwise would. The respondent carriers repudiate the suggestion that they seek or should be permitted to use the assigned-car privilege as a means of securing fuel coal at an unreasonably low price."

In its second report (page 714) the Commission recites the testimony of a witness of the United Mine Workers:—

> "that the use of the assigned car enables the railroad to obtain cheaper fuel at the expense of the public, because with short-car supply at other mines the cost of production is increased, and this increased cost is passed on to the public."

The only clear suggestion of finding in this is the Commission's statement that the record does not support the charge of price coercion. And

that ought to be enough. Doubtless it is as true of the purchase of coal as of other commodities, that price is affected by the ability of the seller to sell in quantity to a customer able to receive and pay. Again it is to be recalled that the railroads must have their full fuel requirements and must have them first. What effect the necessity to receive the coal in cars, however enforced, may have on price is inevitable.

Difficulty of ascertaining discriminatory effect of assignment.

The Commission observes (page 542) that "Because of wide differences in the practices of the railroads, and the many fluctuations due to changes in car supply, public clamor for coal, or service orders of the commission, it is extremely difficult to state in precise terms as to a division of a particular line what would have been the effect on the distribution of cars to commercial mines had no cars been assigned; and it is even more difficult to express in any arithmetical manner the result as to the carriers generally."

Effect of abolition of Assignment on Car Supply.

Nevertheless the Commission seeks to demonstrate unreasonableness of assignment by assuming that abolition would increase the number of unassigned cars for general distribution. This is a plain inference from the Commission's discussion of the table appearing at page 543,—see also page 719. But if we assume, as we must, that a certain number of railroad cars (whether assigned or unassigned) are necessary to receive and carry rail-

road fuel, how can any theorizing make those cars available at the same time to other mines than the mines from which the railroad has arranged to secure its fuel? Whatever railroad fuel cars may be called, they are in fact not available at such other mines and cannot be made so. Moreover, looking at the table on page 543 relating to coal producing districts on the C. & O. Railroad, how can it be assumed that foreign line fuel cars, assigned to particular mines on that Railroad, would have been sent on to C. & O. rails at all without assurance that the assignment directions would be respected? The reality is, as the majority opinion puts it (page 546):—

Foreign line fuel cars unavailable generally.

> "If a foreign carrier were not permitted to assign its own cars to a coal-loading carrier, the latter would be under the primary duty of supplying cars at the mines. There would follow a reduction in the supply available for the commercial mines, because of the necessity for spreading the cars that were at hand over a wider field, unless the foreign carriers were compelled to participate in furnishing coal cars for the service."

Private cars unavailable generally.

Similarly as to private cars: nowhere does the Commission say, nor can it say, that the directions of their owners may be disregarded. To avoid constitutional objection of confiscation the alternative is that private cars which may not be placed as

directed by their owners because in excess of a distributive share must stand idle, assuming the validity of the Commission's prohibition. And the same conclusion is true as to foreign railway fuel cars, as Commissioner Potter points out (page 577), unless the foreign line is willing to present them to the coal-originating line for indiscriminate service.

Yet the Commission, assuming abolition of assignment, includes such cars, as well as private cars, when building up the percentage of cars which would have been generally available but for assignment. Such tabulations by the Commission are no more than mathematical exercises, being based upon inadmissible assumptions. The necessary inferences are strikingly drawn in the dissents of Commissioners Daniels (at page 572) and Potter (at pages 577 and 580).

Duty of foreign lines to aid car supply —not here in issue.

The suggestion of the Commission that foreign carriers be compelled to participate in furnishing cars for their fuel service leads to another subject, the duty to furnish adequate car supply. It is the duty of carriers to afford a reasonably adequate car supply, a duty declared by paragraph (11) of Section 1 of the Act and the Commission has power to enforce performance of the duty. The Commission has inclined to the view that the duty of furnishing cars does not rest alone upon the carrier originating the traffic,—that the duty

is a collective one (page 546). Assuming that the Commission is correct in this view, foreign lines may be obligated to furnish some quota of coal cars, not only for their fuel supply but for the flow of commercial coal customarily moving over their lines. It necessarily follows that the quota of cars furnished by the foreign participating railroad which is not in immediate contact with the shipper must be assigned to this channel of traffic (or cars of the originating railroad in lieu thereof) or else the contribution of cars by the supposedly participating railroad has no basis. If the cars it furnished because of its expected participation in the movement of the traffic are allowed to be diverted into other channels, then it furnishes cars which it is not under obligation to furnish. The necessary corollary is that the car should ply in the channels of traffic in which it shares. But this is impossible if assignment is prohibited. That part of the quota acquired and furnished to connections for fuel supply must come back loaded with fuel coal. But the mines to which they are consigned will not, under the Commission's present order, be allowed to have them, if they exceed the prevailing pro rata share. How then can the foreign line fuel be obtained and what is to be done with the cars? In fact the Commission's theory of collective duty of furnishing cars is inconsistent with its present order against assignment. So too, if

the excess of private cars over and above the general pro rata percentage is not available for general distribution, that fact may affect the adequacy of car supply. But these considerations are foreign to the present case. Doubtless the Commission is giving them expert consideration in the Car Supply Case, mentioned as pending under its Docket No. 14489.

Legally adequate car supply will not avoid shortages.

It is not likely that the carriers will be required so to equip themselves with coal cars as to forestall the possibility of car shortages in the present over-developed condition of the coal trade. Even irrespective of over-development, peak demands are not the measure of the carrier's duty of equipment: Pennsylvania R. Co. *vs.* Puritan Coal Mining Co., 237 U. S. 121, 133; Logan Coal Co. *vs.* Pennsylvania R. Co., 154 Fed. 497, 502; *In re* Private Cars, 50 I. C. C. 652, 671; and Montana, W. & S. R. Co. *vs.* Morley, 198 Fed. 991, 998. Coal car equipment up to the legal standard will not prevent the so-called shortage expectable in the coal trade.

Waste of left over cars—remedy.

Again, from the angle of reasonableness, the Commission remarks the objection that assigned cars are more apt to be left over and wasted than are system cars (page 542). And the Commission finds that the wastage is somewhat greater at assigned car mines than at commercial mines (page 547). As to railroad fuel cars, the funda-

mental assumption here must be that more cars are assigned than are necessary under efficient operation to produce the essential railroad fuel. If too many cars are being assigned for the purpose, then the Commission's simple power and duty is to direct that no more be assigned than are necessary. The objection does not go to assignment nor justify the abolition of assignment.

Disregard of assignment directions.

Another objection is the depleting effect upon the car supply of a given railroad when assignment directions are disregarded (see page 546). Strict obedience to the assignment directions will cure the evil. To abolish assignment because it is not correctly practiced seems inadmissible.

Assertion that assignment causes over-development.

The Commission mentions the opinion of a Labor Union witness (page 714) that over-development of the mining industry has been "caused by the assigned car in the past." Just how or why is not explained. A likely result of efficient and continuous operation of certain mines with assigned cars would be to eliminate mines which have not and can not get the steady business.

IV. The Commission's Order is a Unit; if invalid in any respect, it must fall as a whole.

Unity of the Commission's order.

The court will realize the unity of the Commission's order. Absolute uniformity in car dis-

tribution is required, regardless of railroad fuel necessities, regardless of the source of the coal,—whether on or off line—regardless of the ownership of the mine and regardless of ownership of cars,—whether home line, foreign or private. If the court recognizes the invalidity of the order as to one situation or class of cars, can the court say that the Commission would have made distinctions? If placement by a railroad of its own cars for coal from its own mines on its own line for its own fuel is not illegal then the Commission's order so far is invalid and those railroads which originate coal may tend to buy or control mines for fuel (see page 552) and to avoid contracts for part of the output of mines. But the Commission's suggestions seem to favor the spreading of railroad fuel contracts to the extent of a prorate among all mines. In practice the foreign railroad fuel car can be likened to private cars in everything save the fact of railroad ownership. Foreign railroad fuel cars, considering motive of acquisition and the practical operation of them, may be called the private cars of the foreign railroad. Theoretical distinctions may be based upon the fact of railroad ownership, but the entire problem is intensely practical and the court will in this connection consider the practical possibility of distinction. Perhaps the Commission, with its sweeping expressions on reasonableness and discrimina-

tion, felt unable to make distinctions and cut the knot with bureaucratic finality and disregard of the practical consequences. The Railroads here suggest to the court that because the order is an inseparable unit it must stand or fall as a whole. This court will not in effect make a new administrative order.

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